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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. THE COURT OF APPEALS' HOLDING THAT A RACE BASED SELECTION SYSTEM IS LAWFUL ONLY TO THE EXTENT IT REMEDIES PRIOR DISCRIMINATION BY THE EMPLOYER INVOLVES ISSUES RAISED BUT NOT RESOLVED BY THIS COURT'S DECISION IN *Bakke* AND WHICH URGENTLY NEED RESOLUTION BY THIS COURT 6

II. THE COURT OF APPEALS' HOLDING CONFLICTS WITH THE DECISIONS OF SEVERAL OTHER COURTS OF APPEALS 12

A. The Fifth Circuit's Holding That a Racial Preference is Forbidden Unless it is Enacted to Restore Employees to Their Rightful Places Conflicts with the Decisions of Other Courts of Appeals 13

B. The Fifth Circuit's Standard for Determining Whether Race-Conscious Employee Selections Should be Approved Conflicts with that Adopted by Other Courts of Appeals 15

CONCLUSION 17

Appendix A—*Weber* v. *Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216 (5th Cir. 1977) 1a

Appendix B—*Weber* v. *Kaiser Aluminum & Chemical Corp.*, 571 F.2d 337 (5th Cir. 1978) 47a

Appendix C—*Weber* v. *Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. 761 (E.D. La. 1976) 48a

Page

Appendix D—*Kaiser Aluminum & Chemical Corp.* v. *Weber*, Order granting extension of time to file petition for a writ of certiorari 65a

Appendix E—42 USC § 2000e(2)(a), (d), (h) and (j) 66a

Appendix F—Executive Order 11246 ..... 69a

Appendix G—Revised Order No. 4 ..... 84a

Appendix H—*Weber* v. *Kaiser Aluminum & Chemical Corp.*, Fifth Circuit Judgment 110a

CASES:

Page

Albermarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) 11

Associated General Contractors of Massachusetts, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) 16

Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) 14

Contractors Association of Eastern Pennsylvania v. Schultz, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971) 9, 16

Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3780 (1978) 14

EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3803 (1978) 9, 11, 15

Ford Motor Co. v. Hoffman, 345 U.S. 330 (1953) 9

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 14

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 14

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 8, 11

Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978) 7

Regents of the University of California v. Bakke, 98 S.Ct. 2733 (1978) 7, 8, 11, 17

Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972) 16

United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) 3

United States v. East Texas Motor Freight System, Inc., 564 F.2d 179 (5th Cir. 1977) 8

STATUTES:

Judicial Code, 28 U.S.C. § 1254(1) 2

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d 7

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e 2, 5, 6, 8, 9, 11, 12, 13, 14

§ 703(a) 2, 4
§ 703(d) 2, 4
§ 703(h) 2
§ 703(j) 2, 4

Page

MISCELLANEOUS:

Executive Order 11246, 3 C.F.R. § 339 (1964-1965 Compilation) 2, 4, 5, 6, 8, 9, 11, 13, 14, 15

Revised Order No. 4, 41 C.F.R. § 60-2 (1977) 2

§ 60-2.10 9
§ 60-2.11 10
§ 60-2.12 10

IN THE

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No.

KAISER ALUMINUM & CHEMICAL CORPORATION,
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v.

BRIAN F. WEBER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kaiser Aluminum & Chemical Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 563 F.2d 216 (1977); the denial of the petition for rehearing and petition for rehearing en banc (Appendix B) is reported at 571 F.2d 337 (1978). The opinion of the United States District Court for the Eastern District of Louisiana (Appendix C) is reported at 415 F. Supp. 761 (1976).

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1977 (Appendix H). A petition for rehearing and a petition for rehearing en banc were denied on April 17, 1978 (Appendix B). A timely application for an extension of time to file this petition was granted up to and including September 14, 1978 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May an employer and a union lawfully consider race in the selection of employees for participation in a new craft training program established in part to remedy the past exclusion of minorities from craft employment?

STATUTORY PROVISIONS INVOLVED

Sections 703(a), 703(d), 703(h), and 703(j) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e; Executive Order 11246, 3 C.F.R. § 339 (1964-1965 Compilation), *reprinted in*, 42 U.S.C. § 2000e at p. 281 (1970); and Revised Order No. 4, 41 C.F.R. § 60-2 (1977) are set out in Appendices E, F and G, respectively.

STATEMENT OF THE CASE

Kaiser Aluminum & Chemical Corporation is a government contractor, subject to the affirmative action requirements of Executive Order 11246, as set forth in Revised Order of No. 4, 41 C.F.R. § 60-2. Employees at its Gramercy, Louisiana, plant represented by the United Steelworkers of America, AFL-CIO, include

both unskilled workers and experienced, skilled craft workers.

The area workforce in Gramercy was about 39 percent black when this case was tried in 1975. The total Kaiser workforce was 14.8 percent black at the time, up from 10 percent in 1969 when under pressure from its contract compliance agency, the company began hiring unskilled workers on a one-to-one black to white ratio. Despite this effort, prior to 1974, only five out of 290 craft workers at the Gramercy Plant—i.e., 1.7 percent—were black. A significant factor in the near absence of minorities from the crafts was Kaiser's requirement that applicants have prior experience in the crafts. Because blacks had long been excluded from the craft unions, few were able to present such credentials.

Kaiser was pressed by its contract compliance agency to alleviate this situation and to take steps to assure minority representation in the crafts. At the same time, the Steelworkers were engaged in negotiating a resolution to this and other charges of race and sex discrimination in the steel industry. The results of those negotiations were embodied in the consent decree approved in *United States* v. *Allegheny-Ludlum Industries, Inc.*[1]

As a result, in 1974, the company and the union entered into an agreement creating a new craft training program at each of 15 plants. Under this new program, incumbent employees—white as well as minority—who did not have experience in craft work were afforded an opportunity for the first time to train for craft jobs. As in the craft training program approved

[1] 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

in the Steel Consent Decree, minority and white employees were to share equally in the trainee vacancies, based on relative seniority within each racial group until underutilization of minorities was eliminated. In the first year of the program at Kaiser's Gramercy plant, six white and seven black employees were admitted to the training program. No black employees would have been included among the trainees if selections had been made exclusively on the basis of seniority without regard to race.

Respondent, Brian Weber, was one of the white employees who sought admission to the new trainee program in 1974. He was not selected while less senior minority employees were chosen.[2] His complaint followed alleging that he had been discriminated against because of his race in admission to a training program in violation of §§ 703(a), (d) and (j) of Title VII of the Civil Rights Act of 1964, as amended.

The company, in response, pointed to its affirmative action obligations as a federal contractor under Executive Order 11246. Although the company denied any prior acts of discrimination, it did not offer a detailed justification for the disproportionately small share of its production and craft workforce held by minorities.[3] Moreover, the company witnesses conceded

[2] If the sole prerequisite for selection into the training programs had been plant seniority, Weber would not have been a selectee. Between 35 and 40 employees bidding on the three jobs on which Weber bid had more seniority. Trial transcript at p. 94; Fifth Circuit Appendix at p. 139.

[3] A witness for Kaiser testified that in the past the company had selected the applicants whom it considered best qualified for production jobs and that it had actively sought experienced minority craftsmen in recent years. Trial transcript at pp. 55, 85; Fifth Circuit Appendix at pp. 99, 129.

that Kaiser knew that its requirement for prior experience for craft applicants had a disparate impact on blacks because of their former exclusion from craft unions. This requirement was explained in terms of cost savings to the company.

The District Court decided in Weber's favor on two grounds. First, it held that Title VII prevents employers and unions from voluntarily adopting employment selection quotas based on race even if a court would be empowered to impose them in a litigated case or in a consent decree. Second, it accepted Kaiser's denial of discrimination and declared that even a court would not be authorized by Title VII to impose racial quotas in the absence of a finding of discrimination against the company. The District Court also concluded that the company's obligations under the Executive Order must be subordinated to the specific requirements of Title VII.

Although the Court of Appeals rejected the District Court's holding that the scope of voluntary remedial action was more limited than that which a court could approve or impose, it held that in the absence of evidence to support a finding of prior discrimination by the company neither Title VII nor Executive Order 11246 would support the race-based selection system which Kaiser and the Steelworkers had instituted.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Holding That a Race-Based Selection System Is Lawful Only to the Extent It Remedies Prior Discrimination by the Employer Involves Issues Raised But Not Resolved by This Court's Decision in *Bakke* and Which Urgently Need Resolution by This Court

The Fifth Circuit held in this case that "[i]f Executive Order 11246 mandates a racial quota for admission to on the job training by Kaiser, *in the absence of any prior hiring or promotion discrimination,* the executive order must fall . . . ."[4] Thus, according to the Fifth Circuit, any voluntary compliance with Executive Order 11246 which includes race-conscious selection procedures violates Title VII unless the employer or others are prepared to establish that the employer engaged in past discriminatory acts.

As Judge Wisdom recognized in dissent, this is the "wrong standard" and will put an end to voluntary compliance with the affirmative action mandates of both Title VII and Executive Order 11246.

> The employer and the Union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable.[5]

[4] 563 F.2d at 227.

[5] 563 F.2d at 230. The accuracy of this comment can be seen by comparing the decision below with a subsequent decision of the Fifth Circuit in which the Court held that a prima facie case of discrimination in entry to the crafts at another Kaiser plant was presented by evidence of underutilization of minorities and a prior industrial experience requirement. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1381-82 (5th Cir. 1978).

In *Regents of the University of California* v. *Bakke*,[6] this Court grappled with racial preferences in the admission system of a state and federally supported medical school. A majority of the Court held that race could be a factor in selecting students for admission. However, only four Justices supported the school's exclusion of whites from consideration for a certain number of positions in order to rectify societal discrimination against minorities. Another group of four Justices declared that Title VI of the Civil Rights Act of 1964 prohibits any exclusion from programs which are federally funded regardless of whether or not such exclusion carries with it a racial stigma. Mr. Justice Powell agreed with this latter group that a racial classification cannot be justified simply because its purposes may be benign or simply to promote ethnic diversity. However, his ultimate determination that the medical school's admission system was not justifiable was based on his conclusion that the selection system was unnecessary to the accomplishment of any compelling public interest.[7]

In the course of his opinion, Mr. Justice Powell frequently contrasted the factors in the *Bakke* case with those involved in numerous employment discrimina-

[6] 98 S.Ct. 2733 (1978).

[7] Essentially, Mr. Justice Powell concluded that the admissions system could not be justified as remedying "identified discrimination" or as improving the delivery of health care services to communities currently under served, and that the school's interest in attaining a diverse student body could be met effectively by favorably considering race and ethnic background in a selection process in which all applicants compete for all positions.

tion cases where quota remedies were approved.[8] However, those references leave open questions regarding the appropriate use of racial preferences in employment under Title VII and Executive Order 11246.

Many of these questions can and need to be resolved in this case. Racial preferences are an indispensable means of ending the exclusion of minorities from many occupational categories such as the industrial apprentice and craft jobs at issue here. More subtle attempts to "consider" race or ethnic origin are ill suited and ineffective in situations where little or no room is left for management discretion and vacancies are regularly awarded to the most senior or experienced candidate.[9] In such situations, unless preferences are allowed, sig-

[8] In the context of Title VII litigation, Mr. Justice Powell noted the existence of

> legislative determinations wholly absent here that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination.

98 S.Ct. at 2758 n. 44. Mr. Justice Powell also pointed out that Title VII remedies flow not only from a discovery of disparate impact but also from the absence of any showing that the practice causing that impact was job related. In contrast, he found nothing in the *Bakke* record that

> even remotely suggests that the disparate impact of the general admissions program at the Davis Medical School . . . is without educational justification.

Id. And unlike the cases which involved racial preference in employment prescribed or agreed to by competent administrative agencies, Mr. Justice Powell concluded that the medical school in *Bakke* neither purported to nor was in a position to establish that the racial classification it had adopted was responsive to identified discrimination. *Id.* at 2754-55, 2758.

[9] Such seniority systems, if bona fide, are not made unlawful by their perpetuation of past discrimination or underutilization. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); United States v. East Texas Motor Freight System, Inc., 564 F.2d 179 (5th Cir. 1977). However, this does not mean

nificant change will only occur as new minority employees slowly attain sufficient seniority or experience to preempt vacancies for themselves.

Moreover, the judicial and administrative resources available to direct the application of Title VII and Executive Order 11246 are limited and both laws emphasize voluntary compliance. It is simply not feasible to have governmental bodies make specific findings of past discrimination and to prescribe the precise remedial action to be undertaken by each employer or group of local contractors.

Regulations issued under Executive Order 11246 declare that Kaiser and other government contractors are required to develop and implement an acceptable affirmative action program.[10] Such a program

> must include an analysis of areas within which the contractor is deficient in the utilization of mi-

that such systems are not subject to change where necessary for affirmative action purposes, EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3803 (1978) or by the parties for other lawful reasons. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

[10] Pursuant to Section 202 of the Executive Order, government contractors are not only prohibited from discriminating on the basis of race, color, religion, sex or national origin in their employment practices but they are also obligated to take affirmative action to ensure against such discrimination. The disclaimer in Section 703(j) that Title VII does not require racial preferences to correct imbalances in an employer's work force has been held not to apply to the affirmative action obligations of Executive Order 11246. Contractors Association of Eastern Pennsylvania v. Schultz, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977); *cert. denied*, 46 U.S.L.W. 3780 (1978). During the 1972 amendments to Title VII, a proposal to make Section 703(j) applicable to the Executive Order as well as Title VII was defeated. 118 Cong. Rec. 1676 (1972); *see also*, 563 F.2d at 238.

> nority groups and women and further, goals and timetables . . . to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force . . . .

41 CFR § 60-2.10. Those regulations further state that the Government has concluded that skilled craft work is one of the categories in which minority groups are most likely to be underutilized and that each contractor shall direct special attention to craft jobs in his analysis and goal setting.[11]

The record in this case abundantly reflects Kaiser's attempts to comply with those regulations. It also demonstrates the lack of any practical means of compliance other than the racial classification which it adopted for selecting new craft trainees.[12]

In view of the substantial liabilities and other costs which can flow from employment discrimination, it is difficult to imagine a greater deterrent to affirmative action than the Fifth Circuit's insistence in this case on evidence of discrimination by Kaiser. After agreeing to forego hiring experienced craftsmen and to incur the cost of training inexperienced employees, Kaiser responded to the challenge to its selection program with testimony about its prior underutilization of black craftsmen and production workers. Its witnesses explained the qualification standards it had used for hiring production workers in only the most general terms[13] and simply denied that its actions were discriminatory. Few, if any, employers can be expected to risk more in the name of equal employment opportunity. None should be expected to confess to past discrimination in order to justify a challenged racial preference.

We respectfully submit that consistent with the views of a majority of this Court in *Bakke,* the racial classification agreed to by Kaiser and the Steelworkers can be justified as an essential means of effectuating either or both of two compelling and administratively determined interests: (1) an interest in action "to ensure against" discrimination[14] which is no less substantial than that in remedying past discrimination and (2) an interest in action to "assure utilization of all segments of society and the available labor pool"[15] comparable to the public school's interest in a diverse student body. If more is required to justify the racial classifications needed to provide meaningful employ-

[11] 41 CFR § 60-2-11. Section 60-2.12 *et seq.* of those regulations sets forth the criteria contractors are to apply in developing their goals and timetables.

[12] Kaiser could not find experienced minority craftsmen in significant numbers. Trial transcript at pp. 54-56, 98-99; Fifth Circuit Appendix at pp. 98-100, 142-43. During negotiations, the union would not abandon its consistent prior position that current employees be preferred over inexperienced new hires for these sought after craft jobs. Trial transcript at p. 108; Fifth Circuit Appendix at p. 152. Selecting craft trainees from among current employees on the basis of seniority would produce relatively few minority trainees because of the company's disproportionately low selection of minorities. Trial transcript at pp. 68-69, 92; Fifth Circuit Appendix at pp. 112-13, 136.

[13] This Court has observed that " 'affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systemic exclusion.' Alexander v. Louisiana, 405 U.S. 625, 632." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 342 n. 24 (1977).

[14] While the objective of ensuring against discrimination is stated in Section 202 of Executive Order 11246 as requiring affirmative action by employers, Title VII has a similar "prophylactic" objective. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

[15] EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 46 U.S.L.W. 3803 (1978).

ment opportunities to minorities than that which is present in the record in this case,[16] then both government agencies and private groups should have the direction which only this Court can supply.

II. The Court of Appeals' Holding Conflicts With the Decisions of Several Other Courts of Appeals

In this case, the Fifth Circuit affirmed the District Court's holding that:

> Courts would not mandate a preferential quota system in these circumstances where the preferred workers were not identifiable victims of unlawful hiring discrimination and where in fact there had been no past discrimination by the employer.

563 F.2d at 223. The Court of Appeals, therefore, rested its ultimate conclusion that the selection system adopted by Kaiser and the Steelworkers was unlawful upon two related holdings: (1) A race-conscious selection system violates Title VII unless the preferred workers are identifiable victims of unlawful discriminatory practices; (2) a race-conscious employment selection system violates Title VII absent an admission or facts to support a finding of past discriminatory employment practices on the part of the employer.[17] Both holdings place the Fifth Circuit in substantial conflict with a number of other Courts of Appeals.

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[16] It may be suggested that this case should be remanded in order to allow the record to be supplemented. The company considers the record adequate to resolve the issues it has raised in this petition, but does not object to such a remand.

[17] In denying rehearing, the Fifth Circuit appears to have taken the position that remedial action either must be limited to individual victims of past discrimination or past discrimination must be established against the employer. 571 F.2d at 337 n. 1.

Sound administration of justice would require the resolution of conflicts among the circuits on such basic matters, even if the parties involved were only subject to the jurisdiction of one of the Courts of Appeals involved in these conflicts. However, there is an added reason for resolving the conflicts in this case, because the agreement between Kaiser and the Steelworkers which has been challenged here is national in scope.

A. The Fifth Circuit's Holding That a Racial Preference is Forbidden Unless it is Enacted to Restore Employees to Their Rightful Places Conflicts with the Decisions of Other Courts of Appeals

In rejecting the selection ratio adopted by Kaiser and the union to implement the craft training program, the Court of Appeals asserted that racial preferences are lawful only for the benefit of victims of employment discrimination. "[U]nless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII," the court wrote. 563 F.2d at 225. Further, "a minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment . . . 'because and *only to the extent that he has been discriminated against.*'" *Id.* at 224-25. (Emphasis added). Both of these statements and others misconstrue the concept of class relief endorsed by this Court under Title VII and by several other Courts of Appeals dealing with class preferences adopted pursuant to Executive Order 11246.

It is true, of course, that Title VII authorizes courts to provide "make-whole" relief to individuals to com-

pensate them for past discrimination. But Title VII does not preclude class relief. To the contrary, this Court has recognized that another, indeed foremost objective of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . white employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-30 (1971). Thus there are, in Mr. Justice Powell's words, "two distinct congressional purposes implicit in Title VII." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 783 (1976) (concurring).

Title VII was invoked by Respondent Weber in this case not to authorize a remedy of either kind, but to foreclose one. Citing *Carter* v. *Gallagher* for the proposition—subsequently rejected in that case by the Eighth Circuit En Banc [18]—the Fifth Circuit held that Title VII prohibits preferential treatment of minorities not previously injured by the employer. In denying the petition for rehearing the Fifth Circuit sought to distinguish this case from *Carter* [19] but the conflict seems inescapable. A similar conflict exists with the Ninth Circuit which, relying on *Carter*, has held that "we do not believe that such [race-conscious] relief may be limited to identifiable persons denied employment in the past . . . ." [20]

Moreover, the Fifth Circuit in its decision below went on to impose this same prohibition on preferences for nonvictims to affirmative action programs adopted pursuant to Executive Order 11246. The Third Circuit in *EEOC* v. *AT&T*,[21] recognized the fallacy of this proposition under the Executive Order.[22] That court declared that the Executive Order is:

> a valid effort by the government to assure utilization of all segments of society in the available labor pool for government contractors, entirely apart from Title VII. Certainly that broader governmental interest is sufficient in itself to justify *relief directed at classes rather than individual victims of discrimination.* (Emphasis added).

556 F.2d at 175.

B. The Fifth Circuit's Standard for Determining Whether Race-Conscious Employee Selections Should be Approved Conflicts with that Adopted by Other Courts of Appeals

Race-conscious employee selection procedures instituted under Executive Order 11246, or under a supplement to the Executive Order adopted by a state agency, have withstood complaints that they imposed

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[18] 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[19] 571 F.2d at 337.

[20] Davis v. County of Los Angeles, 566 F.2d 1334, 1343 (9th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3780 (1978).

[21] 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3803 (1978).

[22] Like Kaiser, AT&T denied that it had ever discriminated. 556 F.2d at 170. However, AT&T's denial and the absence of any findings of discrimination in the consent decree did not prevent the court from upholding the lawfulness of the racial classifications contained in the decree under Title VII as well as under the Executive Order. The court accepted the Government's allegations as being true for purposes of evaluating the remedy. Thus what distinguishes this case from *AT&T* is the absence of a party alleging past discrimination. If, however, voluntary use of racial classification in employment can only be sustained where the employer secures the intervention of a party who will charge it with past discrimination, affirmative action will be sharply reduced.

unlawful racial quotas in the First Circuit [23] and the Seventh Circuit [24] as well as the Third Circuit.[25] In each of these circuits, contractors challenged the racial employment programs prescribed for government construction work.[26] In each case the programs were upheld without any findings by the court that the complaining *employers* had ever discriminated against the minority employees.

Instead of insisting on evidence of discrimination by the employers represented in the litigation, as the Fifth Circuit did in this case, the First, Third and Seventh Circuits looked elsewhere to justify the racial programs. First they took note of administrative determinations that minorities were substantially underrepresented among the skilled craft employees hired by all contractors. Second they observed that such underrepresentation largely resulted from the historical exclusion of minority employees from the building trades unions which supplied craftsmen to the contractors.

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[23] Associated General Contractors of Massachusetts, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

[24] Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972).

[25] Contractors Association of Eastern Pennsylvania v. Schultz, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

[26] The fact that the government has chosen to establish more specific and localized standards for affirmative action programs for construction contractors than for nonconstruction contractors is not legally significant. Nonconstruction contractors no less than construction contractors are required to adopt and make good faith efforts to achieve their affirmative action goals within the guidelines provided by the Office of Federal Contract Compliance. *See* discussion, *supra*, at pages 9-10.

Similar facts exist in this record: Prior to 1974, blacks constituted only 1.7 percent of the skilled craft employees hired by Kaiser in an area with a 39 percent black workforce. Both witnesses called by Kaiser attributed this disparity to the craft unions which had not trained or admitted black employees in the past.[27] Thus, under the legal standard used in three other Courts of Appeals, the affirmative action program instituted by Kaiser and the Steelworkers would not have been found to violate Title VII.[28]

CONCLUSION

For the reasons stated above, Kaiser respectfully requests this Court to grant its petition in this case for a Writ of Certiorari to the United States Court of Appeals for the Firth Circuit.

Respectfully submitted,

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[27] Trial transcript at pp. 56, 102; Fifth Circuit Appendix at pp. 100, 146.

[28] While Mr. Justice Powell referred to these and other cases in *Regents of the University of California* v. *Bakke* as involving "determinations of past discrimination by the industries affected" 98 S.Ct. at 2754, there is no indication that particular contractors were any more responsible for such discrimination than was Kaiser for the situation at Gramercy.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Nov. 17, 1977.

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated, *Plaintiffs-Appellees*,

KAISER ALUMINUM & CHEMICAL CORPORATION and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Defendants-Appellants.

No. 76-3266.

Before WISDOM, GEE and FAY, Circuit Judges.

GEE, Circuit Judge:

In February 1974, Kaiser Aluminum & Chemical Corporation entered into a collective bargaining agreement with United Steelworkers of America, AFL-CIO (USWA), that significantly altered eligibility for on-the-job training to enter craft positions in all Kaiser plants. In an effort to increase the number of minority workers in the craft families, the 1974 Labor Agreement removed the requirement of prior craft experience for on-the-job training and established an entrance ratio of one minority worker to one white worker until the percentage of minority craft workers roughly approximated the percentage of minority population in the area surrounding each plant. Eligibility for training still rested on plant seniority, but to implement their affirmative action goal it was necessary to establish dual seniority lists: for each two training vacancies, one black and one white employee would be selected on the basis of seniority within their respective racial groups.[1] As pre-

[1] The dual lists were maintained solely for eligibility to on-the-job training, and all other seniority benefits were conferred without regard to race.

dictable, black employees have been admitted to Kaiser's on-the-job training program with less seniority than their white competitors. One unsuccessful white bidder working at Kaiser's Gramercy, Louisiana, plant brought this class action on behalf of all persons employed by Kaiser at its Gramercy works who are members of the USWA Local 5702, who are not members of a minority group and who have applied for or were eligible to apply for on-the-job training programs since February 1, 1974. Mr. Weber alleged that by preferring black employees with less seniority for admission to on-the-job training, Kaiser and USWA were guilty of unlawful discrimination in violation of Title VII, 42 U.S.C. §§ 2000e-2 et seq. (1970). The district court agreed and granted a permanent injunction against further use of the 1974 training eligibility quota. Although the 1974 Labor Agreement applies to all Kaiser plants and similar agreements were enacted through the aluminum industry, these facts pertain only to Kaiser's plant in Gramercy, Louisiana, and this action enjoined the use of the quota at that plant only. Kaiser and USWA, supported by numerous amici curiae,[2] bring this appeal asking us to hold that their training quota, which they say is mandated by valid executive action, does not violate Title VII and is justified by past societal discrimination even in the absence of past employment discrimination here.

Affirmative Relief or Reverse Discrimination?

The case before this court today is unique in that the affirmative action complained of was not imposed by the judiciary; rather, this collective bargaining agreement was entered into to avoid future litigation and to comply with

[2] Amicus briefs on behlaf of Kaiser and USWA were filed by Reynolds Metal Company, the United States and the Equal Employment Opportunity Commission, and Aluminum Company of America (ALCOA). Great Plains Legal Foundation, the Southeastern Legal Foundation and the Anti-Defamation League of B'nai B'rith filed amicus briefs supporting appellee Weber.

the threats of the Office of Federal Contract Compliance Program (OFCC) conditioning federal contracts on appropriate affirmative action.[3] The case is also unique in that it presents a conflict between affirmative action dictated by the OFCC under Executive Order 11246 and preferential treatment prohibited by Title VII. In *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), Title VII and Executive Order 11246 dictated the *same* response to massive discriminatory practices throughout the steel industry, but the training quota adopted by Kaiser in response to Executive Order 11246 is flatly and literally prohibited by Title VII, § 703(d), which makes it unlawful to limit access to on-the-job training on the basis of race:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d) (1970). Additionally, section 703(a) prohibits racial classifications in general,[4] and section 703(j)

[3] Executive Order No. 11246 requires all applicants for federal contracts to refrain from employment discrimination and to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." § 202(1), 3 C.F.R. 169 (1974), reprinted following 42 U.S.C. § 2000e (1970). The Executive Order empowers the Secretary of Labor to issue rules and regulations necessary and appropriate to achieve its purpose. He, in turn, has delegated most enforcement duties to the OFCC. *See* 41 C.F.R. 60-20.1 et seq.; 41 C.F.R. 60-2.24.

[4] (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

specifies that the Act shall not require preferential treatment.[5] But, of course, the issue here is not whether preferential treatment is required but whether it is forbidden.

When does preferential treatment become illegal reverse discrimination? The answer depends on the law involved, the nature of the affirmative action, and the factual circumstances of the prior discrimination.[6] Federal courts have

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to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1970).

[5] (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1970).

[6] *See United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) (does redistricting to assure a black majority illegally dilute the voting

agreed that the "make whole" objective of Title VII [7] permits and even requires affirmative relief when necessary to correct continuing inequalities created by past discriminatory employment practices.[8] In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), the Court seems to have adopted this circuit's "rightful-place" doctrine,[9] authorizing fictional seniority in order to place the victims of discrimination in as good a place as they would have enjoyed absent discriminatory hiring practices.

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strength of Hasidic Jews?); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (does the grant of fictional seniority to identifiable victims of employment discrimination illegally discriminate against the seniority rights of nonminority employees?); *Bakke v. Regents of University of California*, 18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 429 U.S. 1090, 97 S.Ct. 1098, 51 L.Ed.2d 535 (1977) (does reservation of a certain number of "black" places in the entering class of a state medical school impermissibly discriminate against better-qualified white students who would have been admitted but for the racial quota?); *Chance v. Board of Examiners and Board of Education of New York*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060 (1977) (does a quota which requires the percentage of black and Puerto Rican supervisors to reflect the surrounding population discriminate by forcing the dismissal of whites with greater seniority?).

[7] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

[8] This duty is analogous to the equitable duty to eliminate the continuing effects of past discrimination in voting rights, *United Jewish Org. of Williamsburgh, Inc. v. Carey, supra; Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965), or to the courts' equitable power to correct continued inequities resulting from intentional segregation of schools. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. 2d 554 (1971).

[9] For a discussion of the "rightful-place" doctrine, *see Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969).

> Obviously merely to require [respondent] to hire the class three victim of discrimination falls far short of a "make whole" remedy. A concomitant award of the seniority credit he presumptively would have earned but for the wrongful treatment would also seem necessary in the absence of justification for denying that relief. Without an award of seniority dating from the time when he was discriminatorily refused employment, an individual who applies for and obtains employment as an OTR driver pursuant to the District Court's order will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors. [footnotes omitted].

Id., 424 U.S. at 767-68, 96 S.Ct. at 1265-1266. The Court made it clear that an award of artificial seniority may not be denied on the ground that it conflicts with the economic interests of other employees.

> [I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make-whole" objective of Title VII. These conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But, as we have said, there is nothing in the language of Title VII, or its legislative history, to show that Congress intened generally to bar this form of relief to victims of illegal discrimination . . . .

Id. at 774, 96 S.Ct. at 1269.

The Supreme Court has never approved the use of a quota remedy to overcome employment discrimination, but circuit courts have repeatedly sanctioned judicially imposed quotas in certain factual circumstances. Prior to the 1972 amendments to Title VII, our circuit approved such a quota. Local 53, *International Ass'n of Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969). *Accord, United States v. International Brotherhood of Electrical Workers, Local 38*, 428 F.2d 144, 149-59 (6th Cir.), *cert. denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed. 2d 248 (1970); *United States v. Sheetmetal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969). In 1972, a Senate amendment to overturn this case law and forbid the use of quota remedies was rejected two-to-one. Legislative History of Equal Employment Opportunity Act of 1972 at 1017, 1042-74, 1081, 1714-17 (1972). The bill amending Title VII in 1972 provided:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Subcom. on Labor of the Senate Com. on Labor and Public Welfare, Legislative History, *supra* at 1844. Since 1972, judicially imposed quota remedies have been widely approved. *United States v. International Union of Elevator Constructors Local 5*, 538 F.2d 1012 (3d Cir. 1976); *EEOC v. Local 638*, 532 F.2d 821 (2d Cir. 1976); *Boston NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Rios v. Enterprise Association Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974); *United States v. N. L. Industries, Inc.*, 479 F.2d

354 (8th Cir. 1973); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (en banc); *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972). But our courts have not been unaware of the dangers of granting preferential treatment on the basis of race:

> There are good reasons why the use of racial criteria should be strictly scrutinized and given legal sanction only where compelling need for remedial action can be shown. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931-32 (2d Cir. 1969). Government recognition and sanction of racial classifications may be inherently divisive, reinforcing prejudices, confirming perceived differences between the races, and weakening the government's educative role on behalf of equality and neutrality. It may also have unexpected results, such as the development of indicia for placing individuals into different racial categories. Once racial classifications are imbedded in the law, their purpose may become perverted: a benign preference under certain conditions may shade into a malignant preference at other times. Moreover, a racial preference for members of one minority might result in discrimination against another minority, a higher proportion of whose members had previously enjoyed access to a certain opportunity. [footnotes omitted].

Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9, 17-18 (1st Cir. 1973). Three circuits have refused to approve racial quotas when the factual circumstances of the past or present discrimination did not dictate such an extraordinary remedy. *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976); *Chance v. Board of Examiners, supra; Watkins v. United Steelworkers of America Local 2369*, 516 F.2d 41 (5th Cir. 1975).

Title VII and Executive Order 11246

Quotas imposed to achieve the "make whole" objective of Title VII rest on a presumption of some prior discrimination. There can be no basis for preferring minority workers if there has been no discriminatory act that displaced them from their "rightful place" in the employment scheme. Several circuits have noted this distinction, holding that quotas or preferential treatment merely to attain racial balance of the work force are unlawful, while quotas to correct past discriminatory practices are not. *United States v. Wood, Wire & Metal Lath. International Union Local 40*, 471 F.2d 408, 413 (2d Cir. 1973); *Carter v. Gallagher, supra* at 329; *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 173 n.47 (3d Cir.), *cert. denied*, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971); *United States v. Ironworkers Local 86*, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed. 2d 367 (1971); *United States v. International Brotherhood of Electrical Workers Local 38*, 428 F.2d 144, 149 (6th Cir.), *cert. denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); *Local 53, International Association of Heat & Frost I. & A. Workers v. Volger, supra* at 1052. *But see EEOC v. American Telephone & Telegraph Co.*, 556 F.2d 167 (3d Cir. 1977); and *Associated General Contractors of Massachusetts, Inc. v. Altshuler, supra* (Executive Order 11246 may provide an alternative justification for racial quotas totally apart from any violation of Title VII).

Courts also have affirmed quota remedies imposed by federal affirmative action programs under the impetus of Executive Order 11246 and comparable state affirmative action programs. *Associated General Contractors of Massachusetts, Inc. v. Altshuler, supra; Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra* (the Philadelphia Plan); *Weiner v. Cuyahoga Community College District*, 19 Ohio St.2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004, 90 S.Ct. 554, L.Ed.2d 495 (1970) (the Cleveland Plan); *Joyce v. McCrane*, 320 F.Supp. 1284

(D.N.J.1970) (the Newark Plan); *Southern Illinois Builders Association v. Ogilvie, supra* (the Illinois-Ogilvie Plan). The affirmative action program mandated by 41 C.F.R. § 60-2 (Revised Order No. 4) for nonconstruction contractors requires a "utilization" study to determine minority and female representation in the work force. Goals for hiring and promotion must be set to overcome any "underutilization" found to exist. The regulation then confuses things mightily by declaring that a goal shall not be considered a device for instituting quotas or reverse discrimination:

> [T]he purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

41 C.F.R. § 60-2.30. Attempts to distinguish a numerical goal from a quota have proved illusory, and most such goals suggested by the OFCC can fairly be characterized as quotas.[10]

We must judge the legality of Kaiser's training ratio in light of both Title VII, with its "make-whole" objective, and Executive Order 11246, with its mandate for affirmative action that does not itself discriminate.

1974 Labor Agreement

Petitioner Weber complains of Kaiser's dual seniority system that permits black employees to be admitted to on-

[10] While serving in the Labor Department, I helped devise minority employment goals for government contractors.

> I now realize that the distinction we saw between goals and timetables on the one hand, and unconstitutional quotas on the other, was not valid. Our use of numerical standards in pursuit of equal opportunity has led ineluctably to the very quotas, guaranteeing equal results, that we wished to avoid.

Silberman, *The Road to Racial Quotas*, Wall St. J., Aug. 11, 1977, at 12, col. 4.

the-job training programs ahead of white employees with greater seniority. The offending portions of the 1974 Labor Agreement provide:

> It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications in the plants set forth below, and, where necessary, establish certain goals and timetables in order to achieve a desired minority ratio: [Gramercy works listed, among others].
>
> As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every nonminority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates . . . .

1974 Labor Agreement, Addendum to Art. 9 dealing with seniority. The Joint Committee entered into a Memorandum of Understanding which established a goal of 39% minority representation in each craft family at the Kaiser Gramercy plant.[11]

The one-for-one ratio was then implemented to accomplish this goal.

> In April, 1974, Kaiser offered bids for on-the-job training opportunities in the craft families of *instrument repairman, electrician* and *general repairman.*

[11] Mr. Dennis E. English, Kaiser's Industrial Relations Superintendent at the Gramercy plant, testified that the great majority of all employees at this plant were hired from the adjacent parishes of St. James and St. John the Baptist. According to census figures, approximately forty percent of the total population of these Parishes are members of minority groups. *Weber v. Kaiser Aluminum Corp.*, 415 F.Supp. 761, 764 (E.D.La. 1976).

> Following the terms of the 1974 Labor Agreement, one black and one white employee were selected on the basis of seniority within their respective racial groups for the vacancies in the instrument repairman category. Similarly, two trainees, one black and one white, were selected for training in the electrician category, and five trainees, three of whom were black, were selected for the general repairman positions. In each of these three cases, the most senior man in his racial group was selected, but in each case one or more white employees not selected had greater seniority and would have been selected had the quota system not been in effect.
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> It has been admitted by Kaiser that members of minority groups with less seniority than Mr. Weber and other members of the class were selected by Kaiser for these programs specifically to meet the established goal of at least thirty-nine percent minority representation in each craft family.

Weber v. Kaiser Aluminum Corp., 415 F.Supp. 761, 764 (E.D.La.1976).

It is undeniable that the 1974 Labor Agreement's one-for-one ratio for training eligibility discriminates on the basis of race. In *McDonald v. Santa Fe Trails Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), the Court held that Title VII prohibits racial discrimination against white employees upon the same standards as would be applicable were they Negroes. 427 U.S. at 278-282, 96 S.Ct. at 2577-2578, 49 L.Ed.2d at 500-01. *Accord Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (Title VII prohibits preferences for any groups, minority or majority).

The district court granted injunctive relief against the complained-of quota system on two grounds:

> (1) Courts may establish affirmative action programs as a form of relief in Title VII cases, but when an em-

> ployer and a union voluntarily adopt a quota system this violates Title VII.[12] Quota systems must be imposed with great caution, and *only the judiciary* should be entrusted with fashioning and administering such relief.
>
> (2) Courts would not mandate a preferential quota system in these circumstances where the preferred workers were not identifiable victims of unlawful hiring discrimination and where in fact there had been no past discrimination by the employer.

We disagree with the district court's reasoning that what courts may force upon employers in the name of Title VII employers and unions may not voluntarily institute. In *United States v. Allegheny-Ludlum Industries, Inc., supra,* which dealt with consent decrees eliminating patterns and practices of discrimination in the steel industry, this court emphasized that voluntary compliance in eliminating unfair employment practices is preferable to court action and that private settlement without litigation is the central theme of Title VII. *See also Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 258 (5th Cir. 1974); *Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 309 (5th Cir. 1970); *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir. 1970); *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399, 402 (5th Cir. 1969); *Oatis v. Crown Zellerbach*, 398 F.2d 496, 498 (5th Cir. 1968). But there is strong authority to support the position that courts are not subject to the same restrictions as employers. Section 703, which defines unlawful employment practices, does not

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[12] The most important and obvious distinction is the fact that Sections 703(a) and (d) of Title VII do not prohibit the courts from discriminating against individual employees by establishing quota systems where appropriate. The proscriptions of the statute are directed solely to employers.

limit judicial remedies which are governed by the broad language of section 706(g) authorizing "such affirmative action as may be appropriate."

> Local 5 contends, however, that the enforcement provisions in § 706(g) are in effect limited by the unlawful employment practices prohibitions in §§ 703(h) and (j). The short answer to that contention is that § 703 defines violations, not remedies.

United States v. International Union of Elevator Constructors Local 5, supra at 1019. In *Franks v. Bowman Transportation Co., supra,* the Supreme Court affirmed this view that the definitional section 703(h) does not limit relief otherwise appropriate under section 706(g). We need not now probe into the distinctions between court-ordered remedies and permissible remedies voluntarily hammered out in collective bargaining agreements because we affirm the district court's opinion on the second ground that under the circumstances of this case the hiring ratio could not be approved even had it been judicially imposed.

No Prior Discrimination

The district court found, and appellants all but concede,[13] that Kaiser has not been guilty of any discriminatory hiring or promotion at its Gramercy plant:

> It was also established by the testimony of Mr. English [Kaiser's industrial relations superintendent at its Gramercy plant] that minority employees at the Gramercy plant accounted for only 14.8 percent of the total

[13] Appellants argued that because prior craft experience was formerly required for admittance to on-the-job training and because minorities lacked such experience due to the discriminatory nature of craft unions, indeed there had been some prior discrimination at the Gramercy plant. But only 28 employees were elevated to craft positions through this training program in the ten years prior to 1974; two of these were black. We conclude that this program was so limited in scope that the prior craft experience requirement cannot be characterized as an unlawful employment practice, especially when Kaiser was actively recruiting blacks to its craft families during the same period. That only three black crafts workers were hired from outside the plant reflects the general lack of skills among available blacks but does not reflect any unlawful practice by Kaiser.

> labor force at that plant, and that in an attempt to increase this percentage to conform more closely to the percentage of the general population of the community, Kaiser began to hire new employees "at the gate" on a "one white, one black" basis in 1969. The evidence further established that *Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.*
>
> With regard to craft positions, Mr. English testified that prior to 1974, only five blacks had been hired into these positions, making the black craft population only 2-2½ percent of the total Gramercy plant craft population. *Although this figure might suggest that Kaiser had discriminated against blacks when filling craft positions, Mr. English testified that prior to 1974, Kaiser had vigorously sought trained black craftsmen from the general community.* Although its efforts to secure such trained employees included advertising in periodicals and newspapers published primarily for black subscribers, Kaiser found it difficult, if not impossible, to attract trained black craftsmen. (emphasis added).

415 F.Supp. at 764. In the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII, § 703(a) and (d). Title VII outlaws

preferences for any group, minority or majority, if based on race or other impermissible classifications,[14] but it does not outlaw preferences favoring victims of discrimination. A minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment "not because he is Black, but because, and only to the extent that, he has been discriminated against." *Chance v. Board of Examiners, supra* at 999. If employees who have been arbitrarily favored are deprived of benefits capriciously conferred on them in order that those who were arbitrarily deprived may receive what they should, in fairness, have had to begin with, no law is violated. This is so even if both the class whose rights are restored and the class required to "move over" are defined by race—if the original arbitrariness was defined in that manner. And the reason is that no one is being favored or disfavored, advantaged or injured, under these circumstances *because* of race; rather, those who have been unjustly deprived receive their due and those who have been arbitrarily favored surrender some of the largesse capriciously conferred on them. That these consequences end by race is a mere incident of the fact that they began that way.

Appellants urge this court to approve the on-the-job training ratio not to correct past *employment discrimination* by Kaiser at this plant but to correct a lack of training blamed on past *societal discrimination*. For surely it is common knowledge that many blacks (and others) have suffered arbitrary discrimination in the society, discrimination still producing effects which they carry with them to the Gramercy plant and elsewhere. Our response is that unless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII. Not all "but-for" consequences of racial discrimination warrant relief under Title

[14] *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

VII. *Cf. Local 189, United Papermakers & Paperworkers v. United States, supra* at 988. Finding no victims of employment discrimination, the Eighth Circuit reversed a racial hiring quota designed to favor less qualified minority applicants over more qualified white applicants:

> The fact that some unnamed and unknown White person in the distant past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications is no justification for discriminating against the present better qualified applicant upon the basis of race.

Carter v. Gallagher, supra at 325. Here we do not deal with minority workers less qualified as to skills;[15] presumably each employee seeking admittance to on-the-job training is unskilled for the craft position he or she seeks. Rather, we are confronted with white employees who are more senior than selected black trainees. As noted at the outset, these dual seniority lists, one for black employees and one for white employees, are maintained only for purposes of selecting on-the-job trainees and do not reflect preferential treatment in layoff, recall, transfer assignments, working conditions or any other benefit. But the importance of seniority principles in allocating scarce opportunities such as training for advancement cannot be overlooked.[16] And because

[15] Although ability to perform and physical fitness are factors to be considered in addition to seniority in admitting employees to on-the-job training, the amicus brief of the Equal Employment Opportunity Commission asserts that there was no evidence and no suggestion that any unsuccessful white bidder had greater ability or was more physically fit than the successful black bidders.

[16] Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. S. Slichter, J. Healy & E. Livernash, The Impact of Collective Bargaining on Management, 104-115 (1960). Seniority principles are in-

we deal here solely with an effect of seniority, it is appropriate to draw the line for application of restorative justice at the Gramercy plant, rather than at the larger universe of all Kaiser operations or indeed about society at large. Seniority is acquired at the plant and operates on a basis neither larger nor smaller than the plant. Whatever other effects societal discrimination may have, it has had—by the specific finding of the court below—*no effect* on the seniority of any party here. It is therefore inappropriate to meddle with any party's seniority or with any perquisites attendant upon it, since none has obtained any unfair seniority advantage at the expense of any other. Here, unlike in *Franks v. Bowman Transportation Co., supra,* there has been no discriminatory refusal to hire and therefore, here, there is no occasion to restore any employee to his rightful place. *Accord Watkins v. United Steelworkers of America Local 2369,* 516 F.2d 41 (5th Cir. 1975) (a last-hired, first-fired seniority system resulting in the layoff of more blacks than whites is not discriminatory where the individuals who suffered the layoffs were in their rightful place and had never personally experienced prior employment discrimination); *Chance v. Board of Examiners, supra* (a last-hired, first-fired layoff plan which has never been discriminatory may not be suspended to permit black or Puerto Rican supervisors to keep their jobs in preference to a white supervisor with greater seniority). Where admissions to the craft on-the-job training programs are ad-

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creasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority). *Ibid.* We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey v. Moore,* 375 U.S. 335, 346-347, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964).

Franks v. Bowman Transp. Co., 424 U.S. at 765, 96 S.Ct. at 1265.

mittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and USWA or by order of court, has no foundation in restorative justice, and its preference for training minority workers thus violates Title VII. We concur in the district court's opinion that however laudable the objective of training minority workers, Title VII clearly proscribes discriminating against majority workers:

> Undoubtedly, the laudable objective of promoting job opportunities in our society for members of minority groups has been viewed as a justification for the discrimination against other individuals which almost certainly results from such programs. Prior to the effective date of the 1964 Civil Rights Act, employers may have been free, for whatever motivation, to engage in such discriminatory employment practices. Indeed, it well may be that employers should be permitted to discriminate in an otherwise illegal fashion in order to bring about a national social goal. This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers in light of the unequivocable prohibitions against racial discrimination against *any individual* contained in Sections 703 (a) and (d) of the 1964 Act.

415 F.Supp. at 769 (original emphasis).

Executive Order 11246

Appellants contend that if this racial quota is not sanctioned by Title VII it is sanctioned by Executive Order 11246 and regulations issued by the Office of Federal Contract Compliance (OFCC) mandating affirmative action by all government contractors. Indeed, the district court found that the 1974 collective bargaining agreement reflected less of a desire on Kaiser's part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts.

Appellees respond that because Kaiser has actively recruited black craft workers it has complied with the executive requirement of affirmative action and is not guilty of "underutilization." They argue that, properly interpreted, Executive Order 11246 would not require a racial quota in these circumstances and that the OFCC improperly threatened the withdrawal of all federal contracts unless this racial preference was enacted.

Executive Order 11246, with its implied mandate for affirmative action on the part of those who would supply the government with goods or services, has been upheld as valid executive action. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra* at 166-71 (upholding the "Philadelphia Plan"); *see also Farkas v. Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967). But executive orders may not override contradictory congressional expressions. In the famous challenge to executive power in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), Justice Jackson divided executive orders into three categories: (1) those in which the President acts pursuant to express or implied authorization by Congress, as to which his authority is at a maximum; (2) those in which the President acts in the absence of congressional grant of authority and must rely upon his own independent powers; and (3) those in which executive action conflicts with the express or implied will of Congress and is most vulnerable to challenge.

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. [footnotes omitted].

343 U.S. at 638, 72 S.Ct. at 871. The Third Circuit first validated the Philadelphia Plan as valid executive action and then tested it for conflicts with congressional action, holding that "the Executive is bound by the express prohibitions of Title VII." 442 F.2d at 171-72. The Third Circuit held that the general prohibition against discrimination found in sections 703(a), (h) and (j) did not prohibit the affirmative action imposed by the Philadelphia Plan, *given a finding of prior exclusionary practices* by the six trade unions controlling the work force.

Whether Kaiser has already met its affirmative action burden or not, we are unable to harmonize the more explicit language of section 703(d), which specifically prohibits racial classification in admission to on-the-job training programs, with the affirmative action imposed here. If Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination*, the executive order must fall before this direct congressional prohibition.

We deny appellants relief, not unmindful of the delayed opportunities for advancement this will occasion many minority workers but equally aware of our duty, in enforcing Title VII, to respect the opportunities due to white workers as well. Whatever the merits of racial quotas—and the short-term and obvious benefits must not blind us to the seeds of racial animus such affirmative relief undeniably sows [17]—Congress has forbidden racial preferences in ad-

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[17] Racial quotas also have been criticized for contributing to the Balkanization of this country by fostering "the dangerous notion that ethnic, racial or religious groups are entitled to proportional representation in all occupations."

In hindsight, one can see this was predictable. We wished

mission to on-the-job training programs, and under the circumstances of this case we are not empowered by the equitable doctrine of restorative justice to ignore that proscription.

AFFIRMED.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent.

Today the Court grapples with the question whether, in a collective bargaining agreement, recognition of race for remedial purposes in employment practices is legal "affirmative action" or illegal "reverse discrimination." The majority does not assert race may never be considered in employment practices or in other racially tense areas. Over ten years ago this Court declared, "The Constitution is both color blind and color conscious."[1] Where I differ from the majority is in my assessment of situations justifying reliance on race as a basis for decision-making. Here, the decision-making was by agreement between management and the union, presumably with the blessing of the legislative and executive branches of government but without benefit of the judicial branch. "Management and the government

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to create a generalized, firm, but gentle pressure to balance the residue of discrimination. Unfortunately, the pressure numerical standards generate cannot be generalized or gentle; it inevitably causes injustice.

Silberman, supra at col. 5.

[1] *United States v. Jefferson County School Board*, 5 Cir. 1966, 372 F.2d 836, 876, *aff'd on rehearing en banc*, 380 F.2d 385, *cert. denied sub nom. Caddo Parish School Board v. United States*, 1967, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103. Continuing, we said: "To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." 380 F.2d at 385.

have been our [the unions'] partners in these endeavors [to eliminate discriminatory employment practices] and a great deal of credit must be given to them for the accomplishments of the past ten years." Bredhoff, Affirmative Action in a Declining Economy: Seniority and the Incumbent Majority, in Federal Bar Association, An Equal Employment Opportunity Practice Guide, 118, 119 (1977). The third party beneficiaries of these joint endeavors and agreements are the disadvantaged minorities.

There are three independent legal justifications for these defendants' actions. I must therefore dissent.

I.

The majority accurately and completely presents the facts of this case. A look at the facts from a different point of view, however, is needed to put the defendants' actions in the proper perspective.

This action was brought by a white worker at the Kaiser Aluminum and Chemical Corporation [Kaiser] plant in Gramercy. Gramercy, a town with a population of about 2000, is in St. James Parish, Louisiana, about fifty miles northwest of New Orleans. The Gramercy plant was opened by Kaiser in 1958. Workers at that plant, as in other Kaiser plants, are represented by the United Steelworkers of America [the Union]. St. James and the adjacent parishes had a minority population of about 43 percent at the time of trial. The workforce in those parishes was estimated at 39 percent black.[2] At the time of trial the Kaiser workforce at Gramercy was 14.8 percent black. This was a sharp increase from 1969, when, under federal government pressure, Kaiser began hiring at the gate on a one-to-one black

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[2] The plan in question applied to blacks, other minority groups, and women. However, at Gramercy its application thus far has involved only blacks. For convenience, I use the term "blacks" both in the specific Gramercy situation and in other situations, when a more complete statement would include the other affected groups.

to white ratio. At that time the Kaiser workforce was approximately 10 percent black.[3] Before 1969 the plant had hired unskilled labor at the gate by choosing "the most qualified". There was evidence at the trial from two Kaiser personnel officials that Kaiser had never discriminated by race at its Gramercy plant.

After the 1969 action, Kaiser was still concerned about the low percentage of black craftsmen at its plant. Prior to 1974 only five of the approximately 290 craftsmen at the plant were black. The company made strenuous but unsuccessful efforts to attract more black craftsmen. Pressure from the federal government continued, not just at the Gramercy plant but nationally. Kaiser and the Union discussed the problem in negotiations leading to their 1974 collective bargaining agreement.

Both sides were under pressure in 1974. The company feared federal action through the Office of Federal Contracts Compliance, the agency charged with enforcing Executive Order 11246. Both Kaiser and the Union feared private Title VII actions, by blacks on the basis of crafts employment. The contractual provision set out by the majority resulted. It was incorporated in the national collective bargaining agreement, governing fifteen Kaiser plants across the country. Very similar provisions were included in the Union's contracts with the other two major American aluminum producers, Reynolds Metals and ALCOA.[4]

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[3] The record shows that the Gramercy plant has experienced an increase in black employment of about one percent of their total workforce per year since 1969. Although there was no direct evidence about the percentage of black employees in 1969, extrapolation from those figures produces an estimate that about 10 percent of the Kaiser workforce at Gramercy was black in 1969. Appendix at 123-24, 129-30, 137.

[4] Both companies entered this action as amici curiae, asserting an interest in the litigation because collective bargaining agreements to which they are parties contain similar provisions. ALCOA Brief at 1, Reynolds Brief at 1.

A similar provision was also contained in the national steel producers settlement, approved by this Court in *United States v. Allegheny-Ludlum Industries, Inc.*, 5 Cir. 1975, 517 F.2d 826. The government had investigated racial discrimination by the country's nine major steel producers. The government, the producers, and this same union conducted intensive negotiations. After six months of negotiations, the government filed a pattern and practice suit against the Union and the nine producers. Simultaneously, two consent decrees were filed. The first decree, entered in April 1974, provided:

> All permanent vacancies in apprenticeships and in entry level jobs in lines of promotion containing occupations which in fact lead to craft jobs, shall be filled on a plant-wide basis from among qualified bidding employees . . . In order to meet the implementing ratio [50 percent], seniority factors shall be applied separately to each group for whom timetables are established and to all other employees.

United States v. Allegheny-Ludlum Industries, Inc., Consent Decree I, BNA FEP Manual, 431: 125, 138-39 (1974). Although that decree had not been entered at the time of the agreement in question here, there was testimony that the Kaiser agreement was influenced by the Allegheny-Ludlum negotiations.[5] The Union was a party to both agreements.

II.

The district court rested its decision on two grounds. First, it held that Title VII prohibited completely any privately imposed "quotas". Alternatively, it found this plan

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[5] *See* Appendix at 152 (Thomas Bowdle, Kaiser's Director of Equal Opportunity Affairs), 131 (Dennis English, Industrial Relations Supervisor at Gramercy).

illegal because a court would not have imposed it as a remedy in the circumstances this case presents. The majority properly rejects the first ground. As Judge Gee points out, that position would completely contradict the emphasis Congress laid on voluntary conciliation under Title VII. *See Albemarle Paper Co. v. Moody,* 1975, 422 U.S. 405, 417-18, 95 S.Ct. 2362, 45 L.Ed.2d 280; *Alexander v. Gardner-Denver Co.,* 1974, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147. The majority, however, accepted the district court's second ground, and agreed that this plan would not have been imposed by a court.[6] The Court accepted that conclusion largely on the strength of the district judge's finding that the defendants had not engaged in discrimination in the past at Gramercy. I believe that the majority has judged the defendants' actions by the wrong standard.[7]

The majority's standard produces indirectly what the district court's first ground established directly—an end to voluntary compliance with Title VII. The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice

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[6] The majority opinion leaves in question the status of consent decrees. These decrees, like the one approved by this Court two years ago in *Allegheny-Ludlum,* may be entered without extensive fact-finding by the district court. If consent decrees are immune from the majority's test, friendly suits would offer employers an easy way to circumvent the holding of this opinion. If they are not immune, the district court, before accepting the consent decree, will be forced to determine the existence and extent of past discrimination by the defendants.

[7] For reasons detailed below, at 221-222, I believe that the district court's finding that there was no prior discrimination at the Gramercy plant is highly questionable. Even under the majority's standard, the district court must be reversed if that finding is clearly erroneous. Rule 52(a) F.R.Civ.P. My disagreement with the standard the majority applies makes it unnecessary to determine whether this finding falls within Rule 52(a).

suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal actions. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay. *See Albemarle Paper Co. v. Moody,* 1975, 422 U.S. 405, 422-23, 95 S.Ct. 2362, 45 L.Ed.2d 280.

Divining the result a court would reach in any litigation is no small problem. In Title VII litigation it is particularly serious, in spite of the earnest efforts of courts, including this Court, to clarify the law. Different courts may apply the law in arguably proper distinct ways. Furthermore, decisions in these cases are fact-sensitive. An employer or a union must not only be sure of the law, but must be confident of what facts will be found. Those problems afflict an employer with a single plant. Kaiser and the Union faced a more difficult situation. They were writing a national contract, covering 15 different plants. Each plant has its own area, its own history. Fifteen separate legal opinions would be required because, under the majority's approach, each plant will be judged on its own facts. To complicate matters further, many companies, including Kaiser, operate in several federal circuits. If the interpretation of Title VII law varies among the circuits, a national agreement is even more difficult.

The majority's standard will lead to less voluntary compliance with Title VII. Employers and unions would be liable unless they instituted exactly what a reviewing court felt should have been instituted. They could either bring declaratory judgment actions, or wait to be sued. Under either alternative, our dockets would be filled with more Title VII suits, the Congressional emphasis on voluntary conciliation would be frustrated, and the elimination of the blight of racial discrimination would be still further delayed.

In this case of first impression,[8] we should not hold these defendants to so strict a standard. If an affirmative action plan, adopted in a collective bargaining agreement, is a reasonable remedy for an arguable violation of Title VII, it should be upheld. A zone of reasonableness, within which the employer and the union would be sheltered from lia-

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[8] The Supreme Court expressly reserved the question of the validity of "affirmative action programs" when it held that Title VII applied to white male workers. *McDonald v. Santa Fe Trail Transportation Co.*, 1976, 427 U.S. 273, 281 n. 8, 96 S.Ct. 2574, 49 L.Ed.2d 493. The Courts of Appeals have considered and rejected "quotas" in some cases where such relief was sought in the district courts. *See, e.g., Chance v. Board of Examiners*, 2 Cir. 1976, 534 F.2d 993, *cert. denied*, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060; *Watkins v. United Steelworkers of America*, 5 Cir. 1975, 516 F.2d 41; *Waters v. Wisconsin Steel Works*, 7 Cir. 1974, 502 F.2d 1309, *cert. denied*, 1976, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823. Several lower courts have considered voluntarily instituted preferential hiring in light of Title VII. *See Cramer v. Va. Commonwealth University*, 1976, E.D.Va., 415 F.Supp. 673; *Reeves v. Eaves*, 1976, N.D.Ga., 411 F.Supp. 531. *Cf. Anderson v. San Francisco School Unified District*, 1972, N.D. Cal., 357 F.Supp. 248 (not governed by Title VII); *Flanagan v. Georgetown University*, 1976, D.D.C., 417 F.Supp. 377 (distribution of scholarship funds, governed by Title VI).

The Supreme Court has held that race may "be considered in formulating a remedy" (*North Carolina State Board of Education v. Swann*, 1971, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586); in devising remedies, seniority credits for past discrimination (*Franks v. Bowman Transportation Co.*, 1976, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444); in carrying out a prophylactic program to prevent racially disadvantageous outcomes, whether or not they violate the Constitution (*United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 1977, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229); in avoiding racially disproportionate effects of employment testing practices (*Albemarle Paper Co. v. Moody*, 1975, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280).

bility, would encourage private settlements.[9] If this standard were applied to the case before us, we should reverse.

In spite of the district court's finding that the defendants had not discriminated against blacks at Gramercy, there were arguable violations. The district court made its finding on the basis of testimony from two Kaiser personnel officials. The defendants were never required to rebut a prima facie case, proved statistically, because the statistics were never analyzed by the district court.[10] The reason for the lack of analysis is clear: no litigant wanted to see past discrimination found. The plaintiffs knew it would weaken their case. Kaiser and the Union could only admit past discrimination by strongly inviting private suits by blacks. Although the trial below was in no way collusive, the defendants could well have realized that a victory at the cost of admitting past discrimination would be a Pyrrhic victory at best. In the district court no one represented the separate interests of the minority employees of Kaiser, the only people potentially interested in showing past discrimination. It is not surprising, therefore, that no party fully analyzed the facts within the context of Title VII. Such an analysis would show three possible or probable violations.

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[9] We need not consider in this case the validity of a settlement if actual, as opposed to arguable, discrimination is found by a reviewing court. Even if such a settlement were given no effect, voluntary compliance would be encouraged because the employer would be protected from suits from at least one side.

[10] Usually, a statistical showing of a significant discrepancy between the percentage of minority group members employed and the percentage of the minority group members in the relevant labor market is sufficient to make a prima facie case for a violation. *See International Brotherhood of Teamsters v. United States*, 1977, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396; *Wade v. Mississippi Cooperative Extension Service*, 5 Cir. 1976, 528 F.2d 508, 516-17; *United States v. Hayes International Corp.*, 5 Cir. 1972, 456 F.2d 112, 120. *See also Hazelwood School District v. United States*, 1977, —— U.S. ——, —— - ——, 97 S.Ct. 2736, 2741-2744, 53 L.Ed.2d 768, 777-80; *Dothard v. Rawlinson*, 1977, —— U.S. ——, —— - ——, 97 S.Ct. 2720, 2726-2728, 53 L.Ed.2d 786, 797-98.

First, Kaiser may have discriminated against blacks for unskilled jobs. The evidence showed that although 39 percent of the area workforce was black, only 14.8 percent of Kaiser's employees in 1974 were black. That was an increase from around 10 percent in 1969. The testimony that Kaiser had hired "the best qualified" before 1969 left open the possibilities that Kaiser had determined qualifications through non-validated tests,[11] or impermissibly subjective processes.[12] The statistics here constituted a prima facie case of discrimination.[13] The district court did not require and the defendants did not present any evidence in rebuttal. Such discrimination would be linked to this case because in the absence of that discrimination, more blacks could have entered a training program based solely on seniority.[14]

Second, the requirement that employees have prior experience in the crafts to enter the limited training program in effect before 1974 may have violated Title VII. Only two

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[11] *See* 42 U.S.C. § 2000e-2(h) (1970); *Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; *Albemarle Paper Co. v. Moody*, 1975, 422 U.S. 405, 425-36, 95 S.Ct. 2362, 45 L.Ed.2d 280; *James v. Stockham Valves & Fittings Co.*, 5 Cir. 1977, 559 F.2d 310, 334-40; *Pettway v. American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 221.

[12] *See James v. Stockham Valves & Fittings Co.*, 5 Cir. 1977, 559 F.2d 310, 345-47; *Bolton v. Murray Envelope Co.*, 5 Cir. 1974, 493 F.2d 191, 195; *Rowe v. General Motors Corp.*, 5 Cir. 1972, 457 F.2d 348, 359; *United States v. Jacksonville Terminal Co.*, 5 Cir. 1971, 451 F.2d 418, 442, *cert. denied*, 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815.

[13] *Compare Dothard v. Rawlinson*, 1977, —— U.S. ——, ——, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786, 797 (relevant labor market 36.89 percent female, employees only 12.9 percent female establishes prima facie case).

[14] Compare this with the majority's ground for rejecting societal discrimination as a justification for this program, *supra* at pp. 225-226.

of 28 employees trained under that program were black. While there was evidence that each year of a worker's experience saved the company money, no effort was made to present contrary evidence. The judge simply accepted the statement that prior experience was a business necessity validating the requirement in spite of possible differential effects on blacks and whites. The business necessity defense, however, is narrow. The fact that it may be cheaper or more convenient to use a criterion with divergent impact is not enough to justify its use. *See Watkins v. Scott Paper Co.* 5 Cir. 1976, 530 F.2d 1159, 1168, 1179-83, *cert. denied*, 1976, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139; *United States v. Bethlehem Steel Corp.*, 2 Cir. 1971, 446 F.2 652, 662-65; *Local 189, United Papermakers and Paperworkers v. United States*, 5 Cir. 1969, 416 F.2d 980, 989-91 *cert. denied* 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100. *See also Jones v. Lee Way Motor Freight*, 10 Cir. 1970, 431 F.2d 245, *cert. denied*, 1971, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237; *Pettway v. American Cast Iron Pipe*, 5 Cir. 1974, 494 F.2d 211; *Buckner v. Goodyear Tire and Rubber*, 1972, N.D.Ala., 339 F.Supp. 1108, *aff'd without opinion*, 5 Cir. 1973, 476 F.2d 1287 (three cases where training programs were tested against the business necessity standard). *Cf. E.E.O.C. v. New York Times Broadcasting Service*, 6 Cir. 1976, 542 F.2d 356 (prior experience not a valid requirement when the previous employer prevented the discriminatees from acquiring experience).

The majority tries to avoid this contention by asserting that the program was "too limited in scope" to be characterized as an unlawful practice. The size of the program may be relevant to the weight to be given the statistics describing it, but the small impact of an action provides no immunity. *See McDonald v. Sante Fe Trail Transportation Co.*, 1976, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (two people); *Green v. McDonnell Douglas Corp.*, 1973, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (one person). If past experience does not satisfy the business necessity require-

ment, and if more whites than blacks had past experience, then a serious question of Title VII liability is raised even if only one position is at stake.

Third, the requirement of any training for some craft jobs may be illegal. While this claim would be the most easily refuted by an employer, no refutation was even attempted. In light of the extremely narrow scope of the business necessity exception, some rebuttal would be necessary. The district judge accepted Kaiser's claims of nondiscrimination. It appears from the record that Kaiser did act in good faith. The company made admirable attempts to recruit black craftsmen, and responded strongly to the problem with its unskilled labor force in 1969. Good faith, however, is not a defense to Title VII. Although the three potential violations discussed above may not make the district court's finding "clearly erroneous" in the sense contemplated by Rule 52(a), F.R.Civ.P., arguable violations clearly existed.

To immunize this plan the defendants should also be required to show that the plan is a reasonable remedy. The similar provisions required by courts in Title VII litigation demonstrate that this relief can be reasonable. *See, e. g., Rios v. Enterprise Association Steamfitters Local 638,* 2 Cir. 1974, 501 F.2d 622; *United States v. Ironworkers Local 86,* 9 Cir. 1971, 443 F.2d 544, *cert. denied,* 1971, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367; *Buckner v. Goodyear Tire and Rubber Co.,* 1972, N.D.Ala., 339 F.Supp. 1108, *aff'd without opinion,* 5 Cir., 476 F.2d 1287. *Cf. Southern Illinois Builders Association v. Ogilvie,* 7 Cir. 1972, 471 F.2d 680, upholding a similar program under the Executive Order and *United States v. Allegheny-Ludlum Industries, Inc.,* 5 Cir. 1975, 517 F.2d 826, upholding a similar program as part of a consent decree. Three other factors add weight to that conclusion.

First, the plan was negotiated by the employer and the union. The privileges which federal law grants a union as the representative of the covered workers carry with

them the duty to represent in good faith the interests of all the workers. *See Steele v. Louisville & N. Rwy. Co.,* 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (Railway Labor Act); *Ford Motor Co. v. Huffman,* 1953, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048; *Humphrey v. Moore,* 1964, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370; *Vaca v. Sipes,* 1967, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842. An affirmative action plan should be less suspect when negotiated between employer and union. The union's duty to represent white workers, who may often be, as here, a majority of the bargaining unit, serves as a check on the fairness of the plan.[15]

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[15] The Union's influence can be seen in the provisions which give white employees a significant share of these new opportunities. One of the Union's major goals was to provide more advancement opportunities for Kaiser employees in place of workers hired off the street. Appendix at 152.

The Union's duty to bargain in good faith for all its members does not prevent it from fairly advancing the national policy against discrimination, even if that requires assisting some of its members more than others.

> Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest . . . The Court has also held that a collective bargaining agreement may go further, enhancing seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement . . . And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of "the highest priority"; is certainly no less than in other areas of public policy interests.

Franks v. Bowman Transportation Co., 1976, 424 U.S. 747, 778-79, 96 S.Ct. 1251, 1271, 47 L.Ed.2d 444, 469-70.

Second, the kind of relief given reduced the impact on white workers. Our Court and the Supreme Court have adopted the "rightful place" theory for remedying discrimination. *See International Brotherhood of Teamsters v. United States,* 1977, 431 U.S. 324, 371-377, 97 S.Ct. 1843, 1873-75, 52 L.Ed.2d 396, 437-441; *Local 189, United Papermakers and Paperworkers v. United States,* 5 Cir. 1969, 416 F.2d 980, *cert. denied,* 1970, 397 U.S 919, 90 S.Ct. 926, 25 L.Ed.2d 100; *Gamble v. Birmingham Southern R.R. Co.,* 5 Cir. 1975, 514 F.2d 678, 683; *Bing v. Roadway Express, Inc.,* 5 Cir. 1973, 485 F.2d 441. Other circuits also adopted the rightful place theory as a fair solution. *See, e. g., United States v. Navajo Freight Lines,* 9 Cir. 1975, 525 F.2d 1318; *Reed v. Arlington Hotel Co.,* 8 Cir. 1973, 476 F.2d 721, *cert. denied,* 1973, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (remedy must consider the interests of both groups); *United States v. Bethlehem Steel Corp.,* 2 Cir. 1971, 446 F.2d 652, 659.

The rightful place remedy was originally seen as a compromise among three competing theories: "freedom now", "rightful place", and "status quo". *Local 189,* 416 F.2d at 988. The "freedom now" remedy would have displaced white workers in an effort to eliminate completely the effects of past discrimination. The "status quo" remedy would protect all the expectations acquired by white workers. The "rightful place" theory did not attempt to displace white workers, but required that any future actions be untainted by past discrimination. Since that time, some judges have expressed reservations about ordering relief which put too great a burden on white employees to assist blacks: "robbing Peter to pay Paul". *Franks v. Bowman Transportation Co.,* 1976, 424 U.S. 747, 781, 96 S.Ct. 1251, 47 L.Ed.2d 444 (Burger, C. J., dissenting). *See id.,* 424 U.S. at 787-91, 96 S.Ct. 1251 (Powell, J., dissenting and concurring). The most prominent recent cases where a court refused to order a "quota" remedy involved lay-offs, when such a quota would have meant that whites would have lost their jobs in deference to less senior blacks. *See Chance v. Board of Examiners,* 2 Cir. 1976, 534 F.2d 993, *cert. denied,* 1977, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060; *Watkins v. United Steelworkers of America,* 5 Cir. 1975, 516 F.2d 41; *Jersey Central Power & Light Co. v. IBEW,* 3 Cir. 1975, 508 F.2d 687, *vacated and remanded,* 1976, 425 U.S. 987, 96 S.Ct. 2196, 48 L.Ed.2d 812, *on remand,* 3 Cir., 542 F.2d 8; *Waters v. Wisconsin Steel Works,* 7 Cir. 1974, 502 F.2d 1309, *cert. denied,* 1976, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823; *Anderson v. San Francisco School District,* 1972, N.D.Cal., 357 F.Supp. 248; *cf. Kirkland v. New York State Dept. of Correctional Services,* 2 Cir. 1975, 520 F.2d 420 (quotas should not be imposed when identifiable white "victims" of the remedy exist).

In the instant case entirely new rights were created by the plan. None of the white or black employees affected by this proposal had any chance to receive craft training from Kaiser before the 1974 Agreement. Only those workers with prior experience had been eligible for training, and that pool had been exhausted. No white workers lost their jobs, none had expectations disappointed. Instead, the defendants created entirely new expectations in all the employees, without harming the chances of any Kaiser employee for such training.

Finally, the plan is reasonable because it allows significant white participation. Although the fastest way to remedy past discrimination would have been to institute a training program just for blacks,[16] the Agreement provides

[16] A program of pre-training preparation exclusively for blacks was approved by this Court in *Buckner v. Goodyear Tire and Rubber Co.,* 5 Cir. 1973, 476 F.2d 1287, *aff'g without opinion,* 1972, N.D.Ala., 339 F.Supp. 1108. In a dissenting opinion strenuously attacking the use of quota remedies, Judge Hayes of the Second Circuit stated that training programs exclusively for blacks were legitimate affirmative action. *Rios v. Enterprise Ass'n Steamfitters Local 638,* 2 Cir. 1974, 501 F.2d 622, 637.

that 50 percent of the workers trained will be white. Every Kaiser employee can benefit from the program. It is true that black employees receive more than their white colleagues, but the black employees arguably face racial discrimination at Kaiser's hands—the white workers did not. This white participation makes the plan more reasonable. *See Carter v. Gallagher*, 8 Cir. 1972, 452 F.2d 315 (en banc), *cert. denied*, 1972, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338; *United States v. N. L. Industries*, 8 Cir. 1973, 479 F.2d 354; *Patterson v. Newspaper Deliverers' Union*, 2 Cir. 1975, 514 F.2d 767, 773, 775, *cert. denied*, 1976, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203.

Thus, the 1974 Agreement was a reasonable response to the situation. The defendants were faced with arguable violations of Title VII, federal government pressure, and the impending steel industry settlement. They created an affirmative action plan which aided all Kaiser employees while particularly assisting minority group members. We should not upset their efforts.[17]

III.

The defendants' actions may also be upheld as a proper response to societal discrimination against blacks. The majority avoids the merits of this contention.

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[17] One advantage of the standard I propose is that it takes the reasonableness of the remedy into consideration. The majority is concerned mainly with the existence of past discrimination. Once such discrimination is found, the only question appears to be whether a district court could have imposed such a remedy. A district court's remedial authority in Title VII is extremely broad.

> "The provisions of this subsection [§ 706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible."

118 Cong.Rec. 7168 (1972), Section-by-Section Analysis of Equal Employment Opportunity Act of 1972. The standard proposed in this dissent would limit private parties more than § 706(g) limits the judiciary by requiring that the remedy be "reasonable".

The Court does not deny that discrimination by craft unions may have had a major effect on the number of black craftsmen. The majority, however, focuses on the question of seniority. Those affected by the claimed discrimination are now unskilled workers. Because of the lower court's determination that there was no discrimination at Kaiser's Gramercy plant, those unskilled workers have a seniority status which is unaffected by past discrimination. The majority then concludes that past discrimination cannot justify modification of this untainted seniority system to produce the job training ratios used.

> "Where admissions to the craft on-the-job training programs are admittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and USWA or by order of court, has no foundation in restorative justice, and its preference for training minority workers thus violates Title VII."

The majority's error is in its last step. It connects the ratio with a change in the seniority system, but that misses the point. Seniority was the system voluntarily adopted by the defendants to allocate scarce opportunities within the black and white employee groups created by this plan. Although seniority is a major tool in modern labor relations, it is a voluntary tool. Unions and employers may agree on other methods of allocation. If, for example, the training program had provided that training opportunities would be divided among able black and white workers by two separate lotteries, the majority's error would be clear. Although the past discrimination against blacks would not in any way effect their lottery numbers, that would have no implications for the validity of the program. The program stands or falls on its separation of workers into two racial pools for assignment to job training. The way that workers are then selected from within those pools is ir-

relevant. Admissions were not "admittedly and purely functions of seniority", they were functions of race first, then seniority. No other situation existed before 1974 because there was no such training program before the 1974 Agreement. The only training program that existed then made admission a function of experience, not seniority. The Court cannot avoid the merits of the defendants' assertion —societal discrimination justifies this plan.

Therefore, I am forced to confront directly the relationship between societal discrimination and Title VII. This is best dealt with by considering two subsidiary questions: May employers compensate employees for societal discrimination, and may race be used as a sign of societal discrimination?

Although the first question does not appear to have been passed upon in the courts, the answer should be "yes". While the government might not be able to require that restorative justice be done, neither should it prevent it. Title VII prohibits only discrimination by race, sex, religion, or national origin. In other respects the discretion of the employee remains. There should be no objection to an employer preferring, for whatever reasons, employees who have faced discrimination. *See* majority opinion at 224-225.

The second question is more difficult. If employers may assist those victimized by past discrimination, may they use race as a proxy for the existence of such discrimination? A broad acceptance of that proposition could have drastic effects. Most of the ethnic groups represented in this country have been discriminated against at one time or another. If Americans of Irish, Italian, Jewish, or German extraction were allowed employment preferences as compensation for undoubted past societal discrimination, Title VII would be eviscerated.

Yet a negative answer to that question would also have serious implications. Acknowledged and damaging past

discrimination would be without a private remedy in employment training. Unless a member of a minority group could show explicit discrimination, the laws that forbid future discrimination by employers would also forbid correction action for past discrimination by others. If a large number of the people involved are not able to show this specific discrimination, then the group will be caught in the cycle caused by discrimination. The future laps of the race will be of equal length, but blacks, Latin-Americans, Asian-Americans, and women will have to start behind the other competitors.

In the present case the problem is clear. The history of discrimination in the trades is a sorry record of continual exclusion of women and minorities.[18] Yet how many of the excluded workers could prove that they had applied for and been refused crafts jobs or training? How many have been deterred by the knowledge of their exclusion from even attempting to find crafts jobs? In some circumstances it is possible to determine whether a particular person has been harmed by discrimination, and to

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[18] Judicial findings on discrimination in crafts are so common as to make it a proper subject for judicial notice. *See, e.g., United States v. International Union of Elevator Constructors,* 3 Cir. 1976, 538 F.2d 1012; *Associated General Contractors of Massachusetts v. Altshuler,* 1 Cir. 1973, 490 F.2d 9, *cert. denied,* 1974, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307; *United States v. Wood, Wire and Metal Lathers,* 2 Cir. 1973, 471 F.2d 408, *cert. denied,* 1973, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398; *Southern Illinois Builders Association v. Ogilvie,* 7 Cir. 1972, 471 F.2d 680; *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 3 Cir. 1971, 442 F.2d 159; *cert. denied,* 1971, 404 U.S. 854, 92 S.Ct. 447, 30 L.Ed.2d 367; *Local 53 of International Association of Heat & Frost, etc. v. Vogler,* 5 Cir. 1969, 407 F.2d 1047; *Buckner v. Goodyear,* 1972, N.D.Ala., 339 F.Supp. 1108, *aff'd without opinion,* 5 Cir. 1973, 476 F.2d 1287.

The "home town plans", favored by recent Secretaries of Labor as an alternative to the Philadelphia-type plans, have not brought a great improvement. N. Y. Times, October 16, 1977 § 4, at 2, Col. 4.

provide relief to that person. Here we know the discrimination existed, statistics show that it was effective, but it is difficult to identify individual victims. That situation would prevail against Title VII suits directly against the discriminating unions or in situations similar to the one this case presents, where third parties seek to compensate for the discrimination. The result would be a wrong without a remedy.

Some measures to compensate for past discrimination are provided by law currently. The federal government provides by statute a number of preferences for minorities.[19] Closer to this case, employment discrimination law itself imposes requirements on employers which can be viewed only as compensation for racial isolation and its effects. Thus, Title VII's requirement that employment tests must be validated does not require a finding that the employer chose the tests to produce discrimination, nor a finding that the employer produced the conditions that caused lower minority scores on the tests. Instead, it rests on a Congressional purpose not to allow the effects of past discrimination to affect employment decisions when those effects are not job-validated. Similarly, special recruiting efforts aimed at minority groups, often imposed under affirmative action programs,[20] are not conditioned on a showing that the employer intentionally selected the "white" media for recruiting. Instead, it is an effort to compensate for the isolation of minority groups from the mainstream of society, caused at least in part by past discrimination.

This dissent is not the place to explore the contours of a societal discrimination justification for employment or

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[19] *See* Brief of the United States as Amicus Curiae, *Regents of the University of California v. Bakke*, U.S. No. 76-811 (argued Oct. 12, 1977), Appendix A. These programs may be of doubtful constitutionality pending the outcome of *Bakke*.

[20] *See* 41 C.F.R. § 60-2.24(e) (1976).

training preferences. However, when the discrimination is as egregious and recent as that against blacks in the crafts, a reasonable preference in training programs should be upheld.

IV.

A third ground for upholding the defendants' actions is that their program was required by Executive Order 11246, 30 Fed. Reg. 12319. This Executive Order requires federal contractors to take affirmative action to prevent low employment of women and minorities in their workforces, starting from the assumption that most disproportionately low employment is the result of discrimination—if not of the contractor involved, then of someone else. I disagree with the majority's view that if the Executive Order purports to legalize this program, the Executive Order is invalid. I believe, however, that the district court would have to determine whether this plan does in fact comport with the requirements of the Executive Order. Therefore, on this ground I would remand the case to the district court for further proceedings.

I do not disagree with the majority's conclusions that if a conflict between the Executive Order and Title VII exists, it should be resolved in favor of Title VII. But that weighty question of the allocation of power between the legislative and the executive branches of government need not be reached. Here, the two are not in conflict.

As the majority points out, affirmative action plans under the Executive Order have been held constitutional. *See E.E.O.C. v. A.T.&T.*, 3 Cir. 1977, 556 F.2d 167, *aff'g*, 1976, E.D.Pa. 419 F.Supp. 1022; *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 3 Cir. 1971, 442 F.2d 159; *Southern Illinois Builders Association v. Ogilvie*, 7 Cir. 1972, 471 F.2d 680; *Mele v. Department of Justice*, 1975, D.N.J., 395 F.Supp. 592, *aff'd without opinion*, 3 Cir. 1976, 532 F.2d 747. *Cf. Associated General Contractors of Massachusetts v. Altshuler*, 1 Cir. 1973, 490 F.

2d, 9, *cert denied,* 1974, 416 U.S. 957, 94 S.Ct. 1971, 40 L. Ed.2d 307; *Joyce v. McCrane,* 1970, D.N.J., 320 F.Supp. 1184; *Weiner v. Cuyahoga Community College,* 1968, Ohio Ct. of Appeals, *aff'd mem.,* 1969, 19 Ohio St.2d 35, 249 N.E.2d 907, *cert. denied,* 1969, 396 U.S. 1004, 90 S.Ct. 554, 24 L.Ed.2d 495 (similar state plans). For a history of the Executive Order and the response to it in Congress and the courts, *see* Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev. 752 (1972).

The majority seeks to distinguish *Contractors Ass'n of Eastern Pennsylvania* by stressing the finding there that discrimination had existed in the industry. It should be noted that the parties involved in that case were the contractors; the groups discriminating were the crafts unions. The opinion is in fact directly in point in that respect because it involved actions of the non-discriminating parties.[21]

The legal situation has changed significantly since that opinion. Congress has implicitly exempted the Executive Order from the constraints of Title VII.[22] *See* Comment,

[21] The plaintiffs in that case were a contractors' association and several intervening contractors. The unions, against whom the findings of exclusionary practices was lodged, participated only as amici. Thus, the contractors were in the same position that Kaiser finds itself in here.

[22] The predecessor of this Executive Order was mentioned in the 1964 Act in a section dealing with necessary reports, § 709(d), 42 U.S.C. § 2000e-8(d) (1970). It could be argued that the Order was protected by § 1103, 42 U.S.C. § 2000h-3 (1970), which is a saving clause for then existing authority for federal action.

It could also be argued that the rejection in 1969 of the so-called Fannin Rider demonstrated Congressional approval of the Executive Order. The Comptroller General had declared the Philadelphia Plan illegal on the ground that it lacked standards needed to comply with rules regulating competitive bidding. Senator Fannin introduced a rider to an appropriations bill which would have

The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev. 723, 751-57 (1972). Congress did so through three actions taken during consideration of the Equal Employment Opportunity Act of 1972, Pub.L. 92-261. At that time the regulations requiring affirmative action in the form of goals and timetables had been in effect for several years. The "Philadelphia Plan", the subject of the *Association Contractors* decision, had been in effect for three years.

The legislation originally presented would have transferred the entire Executive Order enforcement program to the E.E.O.C. Congress eliminated that provision by an amendment offered by Senator Saxbe. In support of the amendment, the Senator stated:

> It has been the "goals and timetables" approach which is unique to the OFCC's efforts in equal employment, coupled with extensive reporting and monitoring procedures that has given the promise of equal employment opportunity a new credibility.
>
> The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required.

118 Cong.Rec. 1385 (1972). Another amendment which would have had substantially the same result as the original language was rejected by Congress. 118 Cong.Rec. 3367-70, 3371-73, 3959-65 (1972).

denied all funds for any contracts held illegal by the Comptroller General. The debate made clear that the Philadelphia Plan was the target of the Rider. *See* Comment, The Philadelphia Plan, *supra,* 747-50.

The most telling action was the rejection by the Senate of an amendment to § 703(j) of Title VII, offered by Senator Ervin. The Ervin amendment would have extended that section to read:

> Nothing contained in this title *or in Executive Order No. 11246, or in any other law or Executive Order,* shall be interpreted to require any employer . . . to grant preferential treatment to any individual. . . . [Emphasis added.]

118 Cong.Rec. 1676 (1972). This amendment was viewed and debated as an attack on Philadelphia-type plans. *See* 118 Cong.Rec. 1664-65 (1972) (Sen. Javits).[23]

Finally, the section-by-section analysis of the amendments undertaken by the Senate Subcommittee on Labor provided:

> In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of Equal Employment Opportunity Act of 1972 at 1844 (1972). With the decision in *Contractors Association* before it, there can be little question that whatever the status of that opinion before 1972, Congress ratified the Philadelphia Plan as consistent with Title VII.

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[23] Senator Javits made clear the connection between the Philadelphia Plan and the Ervin Amendment:

> "First, it would undercut the whole concept of affirmative action as developed under Executive Order 11246 and thus preclude Philadelphia-type plans."

118 Cong.Rec. 1665 (1972). The *Contractors Association* decision, which upheld the Philadelphia Plan, was printed in the Congressional Record at Senator Javit's request.

The district court did not pass upon the validity and applicability of the Executive Order. There is a question whether Kaiser's extensive recruiting efforts before 1974 completely satisfied the requirements of the Executive Order. *See* 41 C.F.R. § 60-2.1 *et seq.* Furthermore, the regulations promulgated under the Executive Order disclaim any intent to impose a "quota". 41 C.F.R. § 60-2.30. If the majority is right about the effect of Title VII on this litigation, apart from considerations of the Executive Order, then the disavowal in the regulations of quotas might be read in the same way. Those questions require the consideration of the trial court. Therefore, if I accepted the majority's position that Title VII, apart from the Executive Order, prohibited the conduct in question, I would still vacate the decision and remand it for further proceedings.[24]

V.

"Reverse discrimination" is a question of great current concern. It has spawned an extensive literature, and caused heated debates, some between former allies.[25] It

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[24] If, on remand, the district court were to conclude that the Executive Order was not violated by this plan, then a constitutional question might arise about the validity of this federal action. Of course, I express no opinion on the merits of that constitutional question. *See United Jewish Organizations of Williamsburgh v. Carey,* 1977, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229; *Califano v. Webster,* 1977, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360; *Bakke v. Regents of the University of California,* 1976, 18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152, *awaiting decision,* U.S., No. 76-811 (Argued October 12, 1977).

[25] Among the more interesting treatments of this question are R. Dworkin, Taking Rights Seriously 223-39 (1977); N. Glazer, Affirmative Discrimination (1976); Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv.L.Rev. 1 (1976); Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L.Rev. 723 (1974); Fiss, Groups and the Equal Protection Clause, 5 J.Phil. & Pub.Aff. 107 (1976); Fiss, A Theory of Fair

is a troubling question. The color blind constitution, so eloquently invoked by the first Justice Harlan, has great appeal. A person's color should not be relevant to most decisions. This Court knows that acceptance of that principle did not come easily. At this stage in the history of eliminating racial discrimination, the use of a racial criterion because it is "benign" pulls us perilously close to self-contradiction. But in spite of our newly adopted equality, the pervasive effects of centuries of societal discrimination still haunt us. Kaiser and the United Steelworkers sought in a reasonable manner to remedy some of those effects in employment practices. Their actions may or may not be just to all its employees; they may or may not be wise; but I believe they are legal. Therefore, I respectfully dissent.

Employment Laws, 38 U.Chi.L.Rev. 235 (1971); Kaplan, Equal Justice in an Unequal World; Equality for the Negro—The Problem of Special Treatment, 61 Nw.L.Rev. 363 (1966).

APPENDIX B

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated, Plaintiffs-Appellees,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and UNITED STEELWORKERS OF AMERICA, AFL-CIO, Defendants-Appellants.

No. 76-3266

April 17, 1978

* * * * * * * * * * *

On Petitions for Rehearing and Petitions for Rehearing En Banc

(Opinion Nov. 17, 1977, 5 Cir., 1977, 563 F.2d 216)

Before WISDOM,* GEE and FAY, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED[1] and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are also DENIED.

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* Wisdom, J., dissents from the denial of Petition for Rehearing for the reasons stated in his dissenting opinion at 563 F.2d 227-38.

[1] On rehearing it is suggested that our quotation from the panel opinion in *Carter v. Gallagher*, 452 F.2d 315, 325 (8th Cir. 1971) is inappropriate since the en banc court, 452 F.2d 327 *et seq.*, in fact instituted a modified minority hiring quota on rehearing. *Carter*, however, was a case in which past racial discrimination in hiring at the "plant"—in that instance a fire department—was established. Our case is the contrary, and we are not persuaded that the en banc determination there is at variance with our decision here. At all events, we agree with the quotation as applied to our context.

APPENDIX C

UNITED STATES DISTRICT COURT,
E. D. LOUISIANA.

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated,

v.

KAISER ALUMINUM & CHEMICAL CORP. and UNITED STEELWORKERS OF AMERICA AFL-CIO.

Civ. A. No. 74-3510

June 17, 1976.

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JACK M. GORDON, District Judge:

This civil action seeks relief from the effects of alleged illegal discriminatory employment practices by Kaiser Aluminum & Chemical Corporation (hereinafter referred to as "Kaiser"). A trial was scheduled on plaintiffs' request for a preliminary injunction; however, by stipulation of all of the parties the trial was conducted on the merits of plaintiffs' request for a permanent injunction. This opinion, therefore, relates solely to plaintiffs' prayer for injunctive relief against provisions incorporated by Kaiser in its current collective bargaining agreement, as such provisions pertain to Kaiser's employment practices at its plant located at Gramercy, Louisiana. Plaintiffs contend that these provisions establish a quota system which illegally discriminates against non-minority members of the Kaiser Gramercy labor force in violation of Title VII of the Civil Rights Act of 1964.

Brian F. Weber, the individual plaintiff and class representative, has been an employee for Kaiser for approximately seven years, and is presently working as a

laboratory analyst at Kaiser's plant in Gramercy. It appears that Mr. Weber has assumed an active role in the plant's employee-employer relationship inasmuch as he has recently become the chairman of the plant's grievance committee and has also served as a member of the negotiating committee, formed to supply a local supplement to the 1974 Master Labor Agreement, details of which will be discussed later. The plaintiff also is an active member of the United Steelworkers of America Labor Union, AFL-CIO, Local 5702.

In addition to presenting his own claim, Mr. Weber is serving as representative of a class of workers who have similar grievances. This class has been previously defined to include the following employees:

> "All persons employed by Kaiser Aluminum & Chemical Corporation at its Gramercy, Louisiana, works who are members of the United Steelworkers of America, AFL-CIO Local 5702, who are not members of a minority group, and who have applied for or were eligible to apply for one-the-job training programs since February 1, 1974."

Accordingly, the plaintiffs herein consist of Mr. Brian Weber and the class of employees as described above.

The defendants are Kaiser Aluminum & Chemical Corporation, a corporation organized under the laws of the State of Delaware, with its principal place of business in the State of California, and the United Steelworkers of America AFL-CIO (hereinafter referred to as USWA). The USWA is a labor organization created to champion the rights of its members and to bring to bear greater influence upon management during labor negotiations. In the instant case, the USWA is the certified representative of the employees of Kaiser at the Gramercy, Louisiana plant.

On February 1, 1974, Kaiser and USWA entered into an agreement called the "1974 Labor Agreement," which

specified hourly wages of work and conditions of employment. Of particular significance here are the provisions of this collective bargaining agreement relative to minority representation in the trade, craft and assigned maintenance classifications. The pertinent portions of the contract provide:

> It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications, in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio:
>
> [Gramercy Works listed, among others]
>
> As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates . . .
>
> • • • • • •
>
> The term "minority" as used herein shall be as defined in EEOC Reporting Requirements.
>
> (See: Joint Exhibit # 1, "1974" Labor Agreement," pp. 164-165.)

These portions of the contract are foundin an addendum to Article 9 thereof, which deals with "seniority." The "Joint Committee" thereafter entered into a "Memorandum of Understanding"[1] which established a goal of thirty-nine percent as the percentage of minorities that must be represented in each "craft family" at the Kaiser Gramercy plant.[2]

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[1] Joint Exhibit # 2.

[2] Joint Exhibit # 2, p. 8, and Exhibit B thereto.

In April, 1974, Kaiser offered bids for on-the-job training opportunities in the craft families of *instrument repairman, electrician,* and *general repairman.* Following the terms of the 1974 Labor Agreement, one black and one white employee were selected on the basis of seniority within their respective racial groups for the vacancies in the instrument repairman category. Similarly, two trainees, one black and one white, were selected for training in the electrician category, and five trainees, three of whom were black, were selected for the general repairman positions. In each of these three cases, the most senior man in his racial group was selected, but in each case one or more white employees not selected had greater seniority and would have been selected had the quota system not been in effect.

In October, 1974, Kaiser posted additional bids for on-the-job training opportunities, this time in the category of *insulator* and *carpenter.* According to Mr. Weber's testimony, the vacancy in the insulator category was filled by a black employee, since the bid was restricted to blacks only. In the category of carpenter, one black and one white were selected.

It has been admitted by Kaiser that members of minority groups with less seniority than Mr. Weber and other members of the class were selected by Kaiser for these programs specifically to meet the established goal of at least thirty-nine percent minority representation in each craft family.

Kaiser operates many plants throughout the country, but for the purposes of this litigation, we are only concerned with the Labor Agreement as it affects employment practices at the plant located in Gramercy, Louisiana. Mr. Dennis E. English, Kaiser's Industrial Relations Superintendent at the Gramercy plant, testified that the great majority of all employees at this plant were hired from the adjacent parishes of St. James and St. John the Bap-

tist. According to census figures, approximately forty percent of the total population of these Parishes are members of minority groups. It was also established by the testimony of Mr. English that minority employees at the Gramercy plant accounted for only 14.8 percent of the total labor force at that plant, and that in an attempt to increase this percentage to conform more closely to the percentage of the general population of the community, Kaiser began to hire new employees "at the gate" on a "one white, one black" basis in 1969. The evidence further established that Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.

With regard to craft positions, Mr. English testified that prior to 1974, only five blacks had been hired into these positions, making the black craft population only 2-2½ percent of the total Gramercy plant craft population. Although this figure might suggest that Kaiser had discriminated against blacks when filling craft positions, Mr. English testified that prior to 1974, Kaiser had vigorously sought trained black craftsmen from the general community. Although its efforts to secure such trained employees included advertising in periodicals and newspapers published primarily for black subscribers, Kaiser found it difficult, if not impossible, to attract trained black craftsmen.

Moreover, it is apparent from the evidence that Kaiser's decision to bargain for the herein controverted quota system in the 1974 Labor Agreement, which quota system applies on a nationwide basis, was prompted not only by its desire to increase the percentage of its black craftsmen, and afford more job opportunities to blacks, but also by its concern about compliance with rules and regulations issued by the Office of Federal Contract Compliance (OFCC), an agency of the Executive Branch of the U. S.

Government. There is no evidence that Kaiser, in incorporating this quota system in the 1974 Labor Agreement, did so with a view toward correcting the effects of prior discrimination at any of the fifteen plants to which the system had application. To the contrary, it appears that satisfying the requirements of OFCC, and avoiding vexatious litigation by minority employees, were its prime motivations. The plaintiffs here contend that as the quota system affects the Gramercy plant it unlawfully prefers black employees who have never been subject to prior discrimination by Kaiser.

The defendants' initial contention is that seniority rights are derived from collective bargaining agreements, and, thus, are contractual rights which are not properly the subject of Title VII of the Civil Rights Act of 1964.

This Court is aware of the fact that seniority rights are not vested, but rather derive their scope and significance from union contracts. Furthermore, it is well established that seniority rights are subject to alteration with each successive collective bargaining agreement, since seniority is a valid subject matter for the collective bargaining process. *Ferrara v. Pacific Intermountain Express Company*, 301 F.Supp. 1240 (N.D.Illinois, E.D. 1969); *Schick v. N.L.R.B.*, 409 F.2d 395 (7th Cir. 1969).

On the other hand, a union or company cannot lawfully bargain for the establishment or confirmation of unlawful discriminatory practices. *Emporium Cazwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975).

Because the plaintiffs contend that the collective bargaining agreement establishes a quota system which is in violation of the Civil Rights Act of 1964, this Court has the authority and jurisdiction to consider their claims even though the quota system was the product of a labor-management agreement.

In its consideration of Plaintiffs' claims under the 1964 Civil Rights Act, this Court will be concerned only with Title VII of such Act which made the elimination of employment discrimination based on race, color, religion, sex or national origin in all industries affecting interstate commerce an avowed objective of the Federal Government. This endeavor is reflected in Section 703(a) of Title VII [42 U.S.C. § 2000e-2(a)], which reads:

> (a) It shall be unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employer, because of such individual's race, color, religion, sex, or national origin.

Discrimination against any individual on the basis of race in any apprenticeship or training program is also specifically prohibited by Section 703(d) [42 U.S.C. § 2000e-2(d)], which provides:

> (d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program

> established to provide apprenticeship or other training.

During the lengthy debates which preceded this legislation, many employers and legislators expressed the fear that the equal employment provisions of the 1964 Civil Rights Act would be construed to require the hiring of minority group personnel on the basis of quotas in order to rectify existing imbalances in employment. To placate these concerns, Section 703(j)[3] was placed in the Act as a compromise, so as to clarify that the equal employment provisions of the 1964 Act were not intended by the Congress to require that preferential treatment be given any individual or group because of an imbalance that might exist with respect to the total number or percentage of persons of any race, color, religion or sex employed in comparison with the total number or percentage of such persons in that area. See generally, *The Civil Rights Act of 1964*, BNA Operations Manual (1964).

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[3] Section 703(j), 42 U.S.C. § 2000e-2(j) reads:

> (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

In this case Kaiser asserts support for the discrimination against its white employees brought about by its aforesaid affirmative action program in the fact that Section 703(j), while providing that the equal employment provisions of the 1964 Act were not to be interpreted as requiring quotas, does not, within the four corners of that subsection, prohibit quotas in employment or training programs.

After careful consideration of the legislative history of the 1964 Act, and all available jurisprudence, this Court must conclude that such an inference as Kaiser would draw from Section 703(j) cannot override the clear and unequivocal prohibitions against discrimination by an employer against any individual on the basis of race, or color in employment or training programs contained in section 703(a) and 703(d) of the Act. Moreover, there is absolutely nothing in the legislative history of the Act to support such an inference. It is clear that the Congress was aware of the concept of affirmative action programs during its considerations, and that it did not choose to exempt what many consider the salutary or benign discrimination of such programs from its sweeping prohibitions against racial discrimination by an employer against any individual.

Kaiser further seeks to justify the racially discriminatory effects of the quota system which it has adopted by analogizing its affirmative action program to those mandated by United States Courts in response to lawsuits brought by minority group employees under the provisions of Title VII of the Civil Rights Act. It would be well, therefore, briefly to review the history of such court involvement.

After the effective date of the 1964 Act, the courts were deluged with cases alleging employment discrimination, and were left to impose relief commensurate with the nature of the violation. In *Louisiana v. United States,* 225

F.Supp. 353, 393, aff'd 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed. 2d 709 (1965) the Supreme Court for the first time considered the scope of authority of the judiciary to fashion such relief. Its conclusion was that the courts had not only the power but the duty to render decrees which would "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States, supra,* at 380 U.S. 154, at 85 S.Ct. 822.

The lower courts thereafter began exercising this authority realizing that in some cases affirmative action programs were necessary to effectuate the purpose of the 1964 Act. For example, in the case of *Local 53 of Int. Ass'n. of Heat & Frost Insulators & Asbestos Workers v. Vogler,* 407 F.2d 1047 (5th Cir. 1969), the Court explained:

> "In formulating relief from such practices the courts are not limited to simply parroting the Act's prohibitions but are permitted, if not required, to 'order such affirmative action as may be appropriate.' See *United States v. Louisiana,* E.D.La.1963, 225 F. Supp. 353, 393, aff'd, 1965, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709." *Vogler, supra,* at p. 1052.

Additionally, the Court said in *Vogler*:

> "Where necessary to ensure compliance with the Act, the District Court was fully empowered to eliminate the present effects of past discrimination. *United States v. Local 189, United Papermakers & Paperworkers,* E.D.La.1968, 282 F.Supp. 39, 45; *Quarles v. Philip Morris, Inc.,* E.D.Va. 1968, 279 F.Supp. 505, 516. See also *Louisiana v. U. S.,* 1965, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709." *Vogler, supra,* at pp. 1052, 1053.

cf. United States v. United Bro. of Carpenters & Joiners of America, Local 169, 457 F.2d 210 (7th Cir. 1972).

As in the *Vogler* case, the courts most frequently exercised their authority to fashion affirmative relief in cases where the employment scheme in question was found to be neutral on its face, but had the effect of perpetuating the effects of past discrimination. See *United States v. Wood, Wire and Metal Lath. Int. v. Loc. No. 46,* 471 F.2d 408 (2d Cir. 1973); *United States v. Central Motor Lines, Inc.,* 325 F.Supp. 478 (W.D.N.C.1970); *United States v. Ironworkers Local 86,* 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).[4]

As the courts began to impose quota systems and other affirmative action programs on a case-by-case basis, however, many employers contested such authority arguing that Sec. 703(j) of the Civil Rights Act prohibited anyone from granting preferential treatment to a given class.

In the case of *United States v. International Bro. of Electrical Workers Local No. 38,* 428 F.2d 144 (6th Cir. 1970), the Court explains the seemingly incongruent relationship between affirmative relief and preferential treatment thusly:

> "When the stated purposes of the Act and the broad affirmative relief authorization above are read in context with § 2000e-2(j), we believe that section cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices." *Int'l Bro. of Electrical Workers, supra,* at p. 149.

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[4] See also, *Carter v. Gallagher,* 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); *Contractors Association of Eastern Pennsylvania v. Sec. of Labor,* 442 F.2d 159, 173 n. 43 (3d Cir. 1970), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971).

Accordingly, from the principles espoused in *Louisiana v. United States, supra,* and its progeny, it is well established that the judiciary may establish affirmative action programs as a form of relief in certain Title VII cases without running afoul of sections 703(a), 703(d) or 703(j) of the 1964 Act.

At first blush, it might appear inconsistent that the Act on one hand makes unlawful the establishment by employers of affirmative action programs while on the other hand permits, if not requires, the courts to fashion similar relief in certain cases. Upon reflection, however, substantial distinctions become apparent.

The most important and obvious distinction is the fact that Sections 703(a) and (d) of Title VII do not prohibit the courts from discriminating against individual employees by establishing quota systems where appropriate. The proscriptions of the statute are directed solely to employers.

There are other logical and compelling reasons for distinction between employer action and court action. First, because relief of this nature should be imposed with extreme caution and discretion, and only in those limited cases where necessary to cure the ill effects of past discrimination, the courts alone are in a position to afford due process to all concerned in determining the necessity for and in fashioning such relief. Further, the administration of such relief by the courts tends to assure that those remedial programs will be uniform in nature and will exist only as long as necessary to effectuate the purposes of the Civil Rights Act.

Even though the courts may establish affirmative action relief, they have been reluctant to impose quota systems like that in question here, for they recognize that such programs are at best inequitable. In a very recent case, *Kirkland v. New York,* 520 F.2d 420 (2d Cir. 1975), the court made the following observation:

> "The most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited. Commentators merely echo the judiciary in their disapproval of the discrimination inherent in a quota system." *Kirkland, supra* at p. 427.

Thus, the courts are cognizant of the undesirable effects accompanying quota systems, and, accordingly, have established such systems only in factually limited circumstances. For example, the courts in recent decisions have refused the invitation to impose such affirmative action plans without first being convinced that those seeking relief have themselves been the subject of past discrimination. In the case of *Watkins v. United Steel Workers of Am., Local No. 2369,* 516 F.2d 41 (5th Cir. 1975), the Fifth Circuit Court of Appeals held that even though the use of a seniority system to lay off employees may result in the discharge of more blacks than whites, the discharge system was not discriminatory where the individuals who suffered the layoffs were in their "rightful place"[5] since they had never personally experienced prior employment discrimination.

The Court in *Watkins* said, "To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites." *Watkins, supra,* at p. 46.

In another very recent case, *Chance v. Board of Examiners of the Board of Education of the City of New York,* 534 F.2d 993 (2d Cir. 1976), the Court analyzed the imposition of a quota system the effect of which was to require a senior, more experienced white employee to stand aside

[5] For a full discussion of the "rightful place" theory see *United States v. Local 189, United Papermakers & Paperworkers,* 282 F. Supp. 39 (E.D.La.1968) aff'd 416 F.2d 980 (5th Cir. 1969).

and forego the seniority benefits guaranteed him by the New York Education Law, solely because a younger, less experienced employee was black. The *Chance* case was a civil rights class action which began in 1970 for the purpose of correcting an underrepresentation of minorities in supervisory positions in the New York City School System. The United States District Court for the Southern District of New York directed the Board of Education of the City of New York to excess supervisory personnel in accordance with a formula imposing racial quotas upon the excessive process. Excessing rules are very similar to the principles of seniority inasmuch as excessing rules provide, in brief, that when a position in a school district is eliminated, the least senior person in the job classification used to fill that position shall be transferred, demoted or terminated. As the Court of Appeals recognized, the inevitable consequences of the racial quotas preventing the excessing of a black or Puerto Rican are that a white person with greater seniority must be excessed in his place. In reversing the District Court's decision, the Second Circuit explained:

> "Our brothers in the Third and Seventh Circuits have examined the legislative history of Title VII, and they are in accord that this Act was not intended to invalidate bona fide seniority systems. *Waters,* supra, 502 F.2d at 1318; *Jersey Central, supra,* 508 F.2d at 710. Our brothers in the Fifth Circuit say that 'regardless of what that history may show as to congressional intent concerning the validity of seniority systems as applied to persons who have themselves suffered from discrimination, there was an express intent to preserve contractual rights of seniority as between whites and persons who had not suffered any effects of discrimination.' " *Chance, supra,* at 997.

The Court further stated that if a minority worker had been kept from his "rightful place" on the seniority lists

by the use of discriminatory examinations, or other discriminatory practices, he may in some instances, be entitled to preferential treatment. Reasoning, however, that such preferential treatment should be given not because the man is black, but because he had been discriminated against, the Court observed:

> "The 'freedom now' and 'rightful place' doctrines create constructive or fictional seniority to put minority employees in the approximate spot on the seniority list that they would have occupied had they not been the subject of discrimination. *Local 189, United Papermakers v. United States, supra,* 416 F.2d at 988. The former contemplates the displacement of white workers where necessary; the later involves only the filling of vacancies. We have followed the 'rightful place' doctrine to the extent of using plant seniority, instead of departmental seniority, where departmental discrimination has prevented or delayed the transfer of minority workers. *United States v. Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971)." *Chance, supra,* at 999.

Since the evidence received during the trial of the case *sub judice* established that the black employees being preferred over more senior white employees had never themselves been the subject of any unlawful discrimination during hiring, they occupied their "rightful place" in the plan. Accordingly, a plant-wide seniority system at Kaiser's Gramercy plant would have adequately ensured that its minority employees were receiving those benefits commensurate with their seniority. Any dual seniority arrangement or quota system based on race could only have resulted in unlawful discrimination against those white employees with greater seniority. Thus, applying the rationale developed in *Watkins* and *Chance* to the facts of this case, the Court must conclude that an affirmative action quota system such as that imposed by Kaiser would have

been inappropriate for the Gramercy plant, even if defendants were correct in their contention that employers have some right to discriminate by analogy to those cases where courts have ordered affirmative relief programs.

In reaching its conclusion that the discriminatory provisions of Kaiser's affirmative action program violate specific proscriptions of Title VII of the 1964 Civil Rights Act, this Court is well aware that similar programs have been adopted, before and after enactment of the 1964 Act, by many employers in the private and public sector, often because of pressure from various agencies of the Executive Branch of the United States Government. Undoubtedly, the laudable objective of promoting job opportunities in our society for members of minority groups has been viewed as a justification for the discrimination against other individuals which almost certainly results from such programs. Prior to the effective date of the 1964 Civil Rights Act, employers may have been free, for whatever motivation, to engage in such discriminatory employment practices. Indeed, it well may be that employers should be permitted to discriminate in an otherwise illegal fashion in order to bring about a national social goal. This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers in light of the unequivocal prohibitions against racial discrimination against *any individual* contained in Sections 703(a) and (d) of the 1964 Act.

Moreover, if such racial discrimination by employers against individuals is to be sanctioned as a benign exception to the prohibitions of Title VII of the 1964 Civil Rights Act, then it is the opinion of this Court that such exception should be enacted by the Congress, that branch of our government responsible for creation of the national policy reflected in the prohibitions of Title VII, and not by a life tenured member of the Federal Judiciary. Numerous policy decisions of monumental importance to the

nation necessarily would have to be made in creating exceptions to Sections 703(a) and (d) of the 1964 Act, and the type of Congressional scrutiny and public debate such as that reflected in the legislative history of the 1964 Act would ensure that competing interests could be balanced in a fashion consistent with the democratic processes pursuant to which the 1964 Act itself was adopted.

Accordingly, judgment will be entered in favor of plaintiffs, and against defendants, granting a permanent injunction restraining defendants from denying Mr. Weber and the other members of the class access to on-the-job training programs on the basis of race.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-23

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner*,

v.

BRIAN F. WEBER, ET AL.

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 14, 1978.

/s/ J F P, Jr.
Associate Justice of the Supreme Court of the United States

By: J D A

Dated this 7th day of July, 1978.

APPENDIX E

42 USC § 2000e-2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

• • •

TRAINING PROGRAMS

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

• • •

SENIORITY OR MERIT SYSTEM; QUANTITY OR QUALITY OF PRODUCTION; ABILITY TESTS; COMPENSATION BASED ON SEX AND AUTHORIZED BY MINIMUM WAGE PROVISIONS

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges or employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

• • •

PREFERENTIAL TREATMENT NOT TO BE GRANTED ON ACCOUNT OF EXISTING NUMBER OR PERCENTAGE IMBALANCE

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race,

color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

APPENDIX F

PRESIDENTIAL DOCUMENTS

Title 3—THE PRESIDENT

Executive Order 11246

EQUAL EMPLOYMENT OPPORTUNITY

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

SECTION 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

SEC. 102. The head of each executive department and agency shall establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 101.

SEC. 103. The Civil Service Commission shall supervise and provide leadership and guidance in the conduct of equal employment opportunity programs for the civilian employees of and applications for employment within the executive departments and agencies and shall review agency program accomplishments periodically. In order to facilitate the achievement of a model program for equal employ-

ment opportunity in the Federal service, the Commission may consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Part.

SEC. 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, creed, color, or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 105. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this Part, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Part.

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

SUBPART A—DUTIES OF THE SECRETARY OF LABOR

SEC. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B—CONTRACTORS' AGREEMENTS

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies involved as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and

shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided,* That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective con-

tractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, creed, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

SEC. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

SUBPART C—POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES

SEC. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

SEC. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the

Secretary what action has been taken or is recommended with regard to such complaints.

SEC. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

SEC. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

SUBPART D—SANCTIONS AND PENALTIES

SEC. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VI of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry

out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a)(5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

SEC. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

SEC. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

SEC. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209(a)(6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor, or the contracting agency involved, shall promptly

notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

SUBPART E—CERTIFICATES OF MERIT

SEC. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

SEC. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

SEC. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III—NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS

SEC. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction

contracts paid for in whole or in part with funds obtained from the the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

SEC. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such

application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

SEC. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

SEC. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV—MISCELLANEOUS

SEC. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and II of this Order, except authority to promulgate rules and regulations of a general nature.

SEC. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

SEC. 403. (a) Executive Orders Nos. 10590 (January 19, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

SEC. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

SEC. 405. This Order shall become effective thirty days after the date of this Order.

LYNDON B. JOHNSON

THE WHITE HOUSE,

September 24, 1965.

[F.R. Doc. 65-10340; Filed, Sept. 24, 1965; 4:18 p.m.]

APPENDIX G

41 Code of Federal Regulations

PART 60-2—AFFIRMATIVE ACTION PROGRAMS

SUBPART A—GENERAL

Sec.

60-2.1 Title, purpose and scope.

60-2.2 Agency action.

SUBPART B—REQUIRED CONTENTS OF AFFIRMATIVE ACTION PROGRAMS

60-2.10 Purpose of affirmative action program.

60-2.11 Required utilization analysis.

60-2.12 Establishment of goals and timetables.

60-2.13 Additional required ingredients of affirmative action programs.

60-2.14 Compliance status.

SUBPART C—METHODS OF IMPLEMENTING THE REQUIREMENTS OF SUBPART B

60-2.20 Development or reaffirmation of the equal employment opportunity policy.

60-2.21 Dissemination of the policy.

60-2.22 Responsibility for implementation.

60-2.23 Identification of problem areas by organizational units and job groups.

60-2.24 Development and execution of programs.

60-2.25 Internal audit and reporting systems.

60-2.26 Support of action programs.

SUBPART D—MISCELLANEOUS

60-2.30 Use of goals.

60-2.31 Preemption.

60-2.32 Supersedure.

AUTHORITY: 5 U.S.C. 553(a)(3)(B); 29 CFR 2.7; section 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303.

SOURCES 36 FR 23152, Dec. 4, 1971, unless otherwise noted.

SUBPART A—GENERAL

§ 60-2.1 Title, purpose and scope.

(a) This part shall also be known as "Revised Order No. 4," and shall cover nonconstruction contractors. Section 60-1.40 of this chapter, affirmative action compliance programs, requires that within 120 days from the commencement of a contract each prime contractor or subcontractor with 50 or more employees and (1) a contract of $50,000 or more; or (2) Government bills of lading which, in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) who serves as a depository of Government funds in any amount; or (4) who is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, develop a written affirmative action compliance program for each of its establishments. A review of agency compliance surveys indicates that many contractors do not have affirmative action programs on file at the time an establishment is visited by a compliance investigator. This part details the agency review procedure and the results of a contractor's failure to develop and maintain an affirmative action program and then sets forth detailed guidelines to be used by contractors and Government agencies in developing and judging these programs as well as the good faith effort required to transform the programs from paper

commitments to equal employment opportunity. Subparts B and C of this part are concerned with affirmative action plans only.

(b) Relief, including back pay where appropriate, for members of an effected class who by virtue of past discrimination continue to suffer the present effects of that discrimination, shall be provided in the conciliation agreement entered into pursuant to § 60-60.6 of this title. An "affected class" problem must be remedied in order for a contractor to be considered in compliance. Section 60-2.2 herein pertaining to an acceptable affirmative action program is also applicable to the failure to remedy discrimination against members of an "affected class."

[42 FR 3461, Jan. 18, 1977]

§ 60-2.2 Agency action.

(a)(1) Any contractor required by § 60-1.40 of this chapter to develop an affirmative action program at each of his establishments who has not complied fully with that section is not in compliance with Executive Order 11246, as amended (30 FR 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60-2.10 through 60-2.32, the contractor is unable to comply with the employment opportunity clause. An affirmative action plan shall be deemed to have been accepted by the Government at the time appropriate compliance agency has accepted such plan unless within 45 days thereafter the Office of Federal Contract Compliance has disapproved such plan.

(2) The appropriate compliance agency shall notify the contractor and the Office of Federal Contract Compliance when it has accepted an affirmative action plan.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or

through the Office of Federal Contract Compliance Programs or other Government agencies, that the contractor has no affirmative action program at each of his establishments, or has substantially deviated from such an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the regulations in this chapter, the contracting officer shall declare the contractor-bidder nonresponsible and so notify the contractor, the Director, and the compliance agency unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations. Any contractor/bidder which has been declared nonresponsible in accordance with the provisions of this section may request the Director to determine that the responsibility of the contractor/bidder raises substantial issues of law or fact to the extent that a hearing is required. Such request shall set forth the basis upon which the contractor/bidder seeks such a determination. If the Director, in his/her sole discretion, determines that substantial issues of law or fact exist, an administrative or judicial proceeding may be commenced in accordance with the regulations contained in § 60-1.26; or the Director may require the compliance agency to develop the investigation or compliance review further or to conduct additional conciliation: *Provided,* That during any pre-award conferences, every effort shall be made through the processes of conciliation, mediation and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in §§ 60-2.10 through 60-2.32 so that, in the performance of his contract, the contractor is able to meet his equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: *Provided further,* That when the contractor-bidder is declared nonresponsible more than once for inability to comply with the equal employment opportunity clause, the compliance agency shall promptly send to the Director a written request that enforcement proceedings be initiated pursuant to § 60-1.26. Such request

for initiation of enforcement proceedings shall be sent to the Director no later than the date of issuance of the second nonresponsiblity determination.

(c) (1) Immediately upon finding that a contractor has no affirmative action program, or has deviated substantially from an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the requirements of the regulations in this chapter, the compliance agency representative or the representative of the Office of Federal Contract Compliance Programs, whichever has made such a finding, shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance Programs of such fact. Whenever administrative enforcement is contemplated, the compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(a) of Executive Order 11246, as amended, should not be instituted. The notice to show cause should contain:

(i) An itemization of the sections of the Executive Order and of the regulations with which the contractor has been found in apparent violation, and a summary of the conditions, practices, facts or circumstances which give rise to each apparent violation;

(ii) The corrective actions necessary to achieve compliance or, as may be appropriate, the concepts and principles of an acceptable remedy and/or the corrective action results anticipated;

(iii) A request for a written response to the findings, including commitments to corrective action or the presentation or opposing facts and evidence; and

(iv) A suggested date for the conciliation conference.

(2) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program

within 30 days, the compliance agency shall promptly send to the Director a written request for enforcement proceedings pursuant to § 60-1.26 of this chapter. If an administrative complaint is filed, the contractor shall have 20 days to request a hearing. If a request for hearing has not been received within 20 days from the filing of the administrative complaint, the matter shall proceed in accordance with Part 60-30 of this chapter.

(3) During the "show cause" period of 30 days, every effort will be made by the compliance agency through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency shall promptly send to the Director a written request for enforcement proceedings pursuant to § 60-1.26 of this chapter.

(d) During the "show cause" period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

[38 FR 2970, Jan. 31, 1973, as amended at 42 FR 3462, Jan. 18, 1977; 42 FR 5978, Feb. 1, 1977]

Subpart B—Required Contents of Affirmative Action Programs

§ 60-2.10 Purpose of affirmative action program.

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas

within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 5630, Feb. 14, 1974]

§ 60-2.11 Required utilization analysis.

Based upon the Government's experience with compliance reviews under the Executive order programs and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following Employer's Information Report (EEO-1) designations: officials and managers, professionals, technicians, sales workers, office and clerical and craftsmen (skilled). As categorized by the EEO-1 designations, women are likely to be underutilized in departments and jobs within departments as follows: Officials and managers, professionals, technicians, sales workers (except over-the-counter sales in certain retail establishments), craftsmen (skilled and semi-skilled). Therefore, the contractor shall direct special attention to such jobs in his analysis and goal setting for minorities and women. Affirmative action programs must contain the following information:

(a) Workforce analysis which is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit,

or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

(b) An analysis of all major job groups at the facility, with explanation if minorities or women are currently being underutilized in any one or more job groups ("job groups" herein meaning one or a group of jobs having similar content, wage rates and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. In making the utilization analysis, the contractor shall conduct such analysis separately for minorities and women.

(1) In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

(2) In determining whether women are being underutilized in any job group, the contractor will consider at least all of the following factors;

(i) The size of the female unemployment force in the labor area surrounding the facility;

(ii) The percentage of the female workforce as compared with the total workforce in the immediate labor area;

(iii) The general availability of women having requisite skills in the immediate labor area;

(iv) The availability of women having requisite skills in an area in which the contractor can reasonably recruit;

(v) The availability of women seeking employment in the labor or recruitment area of the contractor;

(vi) The availability of promotable and transferable female employees within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to women.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 5630, Feb. 14, 1974; 39 FR 25654, July 12, 1974]

§ 60-2.12 Establishment of goals and timetables.

(a) The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program. Thus, in establishing the size of his goals and the length of his timetables, the contractor should consider the results which could reasonably be expected from his putting forth every good faith effort to make his overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in § 60-2.11.

(b) Involve personnel relations staff, department and division heads, and local and unit managers in the goal setting process.

(c) Goals should be significant, measurable and attainable.

(d) Goals should be specific for planned results, with timetables for completion.

(e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

(f) In establishing timetables to meet goals and commitments, the contractor will consider the anticipated expansion, contraction and turnover of and in the work force.

(g) Goals, timetables and affirmative action commitments must be designed to correct any identifiable deficiencies.

(h) Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables separately for minorities and women.

(i) Such goals and timetables, with supporting data and the analysis thereof shall be a part of the contractor's written affirmative action program and shall be maintained at each establishment of the contractor.

(j) A contractor or subcontractor extending a publicly announced preference for Indians as authorized in 41 CFR 60-1.5(a)(6) may reflect in its goals and timetables the permissive employment preferences for Indians living on or near an Indian reservation.

(k) Where the contractor has not established a goal, his written affirmative action program must specifically analyze each of the factors listed in § 60-2.11 and must detail his reason for a lack of a goal.

(l) In the event it comes to the attention of the compliance agency or the Office of Federal Contract Compliance that there is a substantial disparity in the utilization of a particular minority group or men or women of a particular minority group, the compliance agency or OFCC may require separate goals and timetables for such minority group and may further require, where appropriate, such goals and timetables by sex for such group for such job classifications and organizational units specified by the compliance agency or OFCC.

(m) Support data for the required analysis and program shall be compiled and maintained as part of the contractor's affirmative action program. This data will include but not be limited to progression line charts, seniority rosters, applicant flow data, and applicant rejection ratios indicating minority and sex status.

(n) Copies of affirmative action programs and/or copies of support data shall be made available to the compliance agency or the Office of Federal Contract Compliance, at the request of either, for such purposes as may be appropriate to the fulfillment of their responsibilities under Executive Order 11246, as amended.

[36 FR 23152, Dec. 4, 1971, as amended at 42 FR 3462, Jan. 18, 1977; 42 FR 5978, Feb. 1, 1977]

§ 60-2.13 Additional required ingredients of affirmative action programs.

Effective affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

(a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(b) Formal internal and external dissemination of the contractor's policy.

(c) Establishment of responsibilities for implementation of the contractor's affirmative action program.

(d) Identification of problem areas (deficiencies) by organizational units and job group.

(e) Establishment of goals and objectives by organizational units and job groups, including timetables for completion.

(f) Development and execution of action oriented programs designed to eliminate problems and further designed to attain established goals and objectives.

(g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program.

(h) Compliance or personnel policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60-20).

(i) Active support of local and national community action programs and community service programs, designed to improve the employment opportunities of minorities and women.

(j) Consideration of minorities and women not currently in the workforce having requisite skills who can be recruited through affirmative action measures.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.14 Compliance status.

No contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to this program, and his good faith efforts to make his program work toward the realization of the program's goals within the timetables set for completion. There follows an outline of examples of procedures that contractors and Federal agencies should use as a guideline for establishing, implementing, and judging an acceptable affirmative action program.

Subpart C—Methods of Implementing the Requirements of Subpart B

§ 60-2.20 Development or reaffirmation of the equal employment opportunity policy.

(a) The contractor's policy statement should indicate the chief executive officers' attitude on the subject matter, assign overall responsibility and provide for a reporting and monitoring procedure. Specific items to be mentioned should include, but not limited to:

(1) Recruit, hire, train, and promote persons in all job titles, without regard to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification. (The term "bona fide occupational qualification" has been construed very narrowly under the Civil Rights Act of 1964. Under Executive Order 11246 as amended and this part, this term will be construed in the same manner.)

(2) Base decisions on employment so as to further the principle of equal employment opportunity.

(3) Insure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.

(4) Insure that all personnel actions such as compensation, benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreation programs, will be administered without regard to race, color, religion, sex, or national origin.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.21 Dissemination of the policy.

(a) The contractor should disseminate his policy internally as follows:

(1) Include it in contractor's policy manual.

(2) Publicize it in company newspaper, magazine, annual report and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain intent of policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all other employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory.

(8) Publish articles covering EEO programs, progress reports, promotions, etc., of minority and female employees, in company publications.

(9) Post the policy on company bulletin boards.

(10) When employees are featured in product or consumer advertising, employee handbooks or similar publications both minority and nonminority, men and women should be pictured.

(11) Communicate to employees the existence of the contractors affirmative action program and make available such elements of his program as will enable such employees to know of and avail themselves of its benefits.

(b) The contractor should disseminate his policy externally as follows:

(1) Inform all recruiting sources verbally and in writing of company policy, stipulating that these sources actively recruit and refer minorities and women for all positions listed.

(2) Incorporate the Equal Opportunity clause in all purchase orders, leases, contracts, etc., covered by Executive Order 11246, as amended, and its implementing regulations.

(3) Notify minority and women's organizations, community agencies, community leaders, secondary schools and colleges, of company policy, preferably in writing.

(4) Communicate to prospective employees the existence of the contractor's affirmative action program and make available such elements of his program as will enable such prospective employees to know of and avail themselves of its benefits.

(5) When employees are pictured in consumer or help wanted advertising, both minorities and nonminority men and women should be shown.

(6) Send written notification of company policy to all subcontractors, vendors and suppliers requesting appropriate action on their part.

§ 60-2.22 Responsibility for implementation.

(a) An executive of the contractor should be appointed as director or manager of company Equal Opportunity Programs. Depending upon the size and geographical alignment of the company, this may be his or her sole responsibility. He or she should be given the necessary top management support and staffing to execute the assignment. His or her identity should appear on all internal and external communications on the company's Equal Opportunity Programs. His or her responsibilities should include, but not necessarily be limited to:

(1) Developing policy statements, affirmative action programs, internal and external communication techniques.

(2) Assisting in the identification of problem areas.

(3) Assisting line management in arriving at solutions to problems.

(4) Designing and implementing audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's goals and objectives have been attained.

(5) Serve as liaison between the contractor and enforcement agencies.

(6) Serve as liaison between the contractor and minority organizations, women's organizations and community action groups concerned with employment opportunities of minorities and women.

(7) Keep management informed of latest developments in the entire equal opportunity area.

(b) Line responsibilities should include, but not be limited to, the following:

(1) Assistance in the identification of problem areas and establishment of local and unit goals and objectives.

(2) Active involvement with local minority organizations, women's organizations, community action groups and community service programs.

(3) Periodic audit of training programs, hiring and promotion patterns to remove impediments to the attainment of goals and objectives.

(4) Regular discussions with local managers, supervisors and employees to be certain the contractor's policies are being followed.

(5) Review of the qualifications of all employees to insure that minorities and women are given full opportunities for transfers and promotions.

(6) Career counseling for all employees.

(7) Periodic audit to insure that each location is in compliance in area such as:

(i) Posters are properly displayed.

(ii) All facilities, including company housing, which the contractor maintains for the use and benefit of his employees, are in fact desegregated, both in policy and use. If the contractor provides facilities such as dormitories, locker rooms and rest rooms, they must be comparable for both sexes.

(iii) Minority and female employees are afforded a full opportunity and are encouraged to participate in all company sponsored educational, training, recreational and social activities.

(8) Supervisors should be made to understand that their work performance is being evaluated on the basis of their equal employment opportunity efforts and results, as well as other criteria.

(9) It shall be a responsibility of supervisors to take actions to prevent harassment of employees placed through affirmative action efforts.

§ 60-2.23 Identification of problem areas by organizational units and job groups.

(a) An in-depth analysis of the following should be made, paying particular attention to trainees and those categories listed in § 60-2.11(b).

(1) Composition of the work force by minority group status and sex.

(2) Composition of applicant flow by minority group status and sex.

(3) The total selection process including position descriptions, position titles, worker specifications, application forms, interview procedures, test administration, test validity, referral procedures, final selection process, and similar factors.

(4) Transfer and promotion practices.

(5) Facilities, company sponsored recreation and social events, and special programs such as educational assistance.

(6) Seniority practices and seniority provisions of union contracts.

(7) Apprenticeship programs.

(8) All company training programs, formal and informal.

(9) Work force attitude.

(10) Technical phases of compliance, such as poster and notification to labor unions, retention of applications, notification to subcontractors, etc.

(b) If any of the following items are found in the analysis, special corrective action should be appropriate.

(1) An "underutilization" of minorities or women in specific job groups.

(2) Lateral and/or vertical movement of minority or female employees occurring at a lesser rate (compared to work force mix) than that of nonminority or male employees.

(3) The selection process eliminates a significantly higher percentage of minorities or women than nonminorities or men.

(4) Application and related preemployment forms not in compliance with Federal legislation.

(5) Position descriptions inaccurate in relation to actual functions and duties.

(6) Tests and other selection techniques not validated as required by the OFCC Order on Employee Testing and other Selection Procedures.

(7) Test forms not validated by location, work performance and inclusion of minorities and women in sample.

(8) Referral ratio of minorities or women to the hiring supervisor or manager indicates a significantly higher percentage are being rejected as compared to nonminority and male applicants.

(9) Minorities or women are excluded from or are not participating in company sponsored activities or programs.

(10) De facto segregation still exists at some facilities.

(11) Seniority provisions contribute to overt or inadvertent discrimination, i.e., a disparity by minority group status or sex exists between length of service and types of job held.

(12) Nonsupport of company policy by managers, supervisors or employees.

(13) Minorities or women underutilized or significantly underrepresented in training or career improvement programs.

(14) No formal techniques established for evaluating effectiveness of EEO programs.

(15) Lack of access to suitable housing inhibits recruitment efforts and employment of qualified minorities.

(16) Lack of suitable transportation (public or private) to the work place inhibits minority employment.

(17) Labor unions and subcontractors not notified of their responsibilities.

(18) Purchase orders do not contain EEO clause.

(19) Posters not on display.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.24 Development and execution of programs.

(a) The contractor should conduct detailed analyses of position descriptions to insure that they accurately reflect position functions, and are consistent for the same position from one location to another.

(b) The contractor should validate worker specifications by division, department, location or other organizational unit and by job title using job performance criteria. Special attention should be given to academic, experience and skill requirements to insure that the requirements in themselves do not constitute inadvertent discrimination. Specifications should be consistent for the same job title in all locations and should be free from bias as regards to race, color, religion, sex or national origin, except where sex is a bona fide occupational qualification. Where requirements screen out a disproportionate number of minorities or women, such requirements should be professionally validated to job performance.

(c) Approved position descriptions and worker specifications, when used by the contractor, should be made available to all members of management involved in the recruiting, screening, selection, and promotion process. Copies should also be distributed to all recruiting sources.

(d) The contractor should evaluate the total selection process to insure freedom from bias and, thus, aid the attainment of goals and objectives.

(1) All personnel involved in the recruiting, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to insure elimination of bias in all personnel actions.

(2) The contractor shall observe the requirements of the OFCC Order pertaining to the validation of employee tests and other selection procedures.

(3) Selection techniques other than tests may also be improperly used so as to have the effect of discriminating against minority groups and women. Such techniques include but are not restricted to, unscored interviews, unscored or casual application forms, arrest records, credit checks, considerations of marital status or dependency or minor children. Where there exist data suggesting that such unfair discrimination or exclusion of minorities or women exists, the contractor should analyze his unscored procedures and eliminate them if they are not objectively valid.

(e) Suggested techniques to improve recruitment and increase the flow of minority or female applicants follow:

(1) Certain organizations such as the Urban League, Job Corps, Equal Opportunity Programs, Inc., Concentrated Employment Programs, Neighborhood Youth Corps, Secondary Schools, Colleges, and City Colleges with high minority enrollment, the State Employment Service, specialized employment agencies, Aspira, LULAC, SER, the

G.I. Forum, the Commonwealth of Puerto Rico are normally prepared to refer minority applicants. Organizations prepared to refer women with specific skills are: National Organization for Women, Welfare Rights Organizations, Women's Equity Action League, Talent Bank from Business and Professional Women (including 26 women's organizations), Professional Women's Caucus, Intercollegiate Association of University Women, Negro Women's sororities and service groups such as Delta Sigma Theta, Alpha Kappa Alpha, and Zeta Phi Beta; National Council of Negro Women, American Association of University Women, YWCA, and sectarian groups such as Jewish Women's Groups and Protestant Women's Groups, and women's colleges. In addition, community leaders as individuals shall be added to recruiting sources.

(2) Formal briefing sessions should be held, preferably on company premises, with representatives from these recruiting sources. Plant tours, presentations by minority and female employees, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, followup with sources, and feedback on disposition of applicants.

(3) Minority and female employees, using procedures similar to subparagraph (2) of this paragraph, should be actively encouraged to refer applicants.

(4) A special effort should be made to include minorities and women on the Personnel Relations staff.

(5) Minority and female employees should be made available for participation in Career Days, Youth Motivation Programs, and related activities in their communities.

(6) Active participation in "Job Fairs" is desirable. Company representatives so participating should be given authority to make on-the-spot commitments.

(7) Active recruiting programs should be carried out at secondary schools, junior colleges, and colleges with predominant minority or female enrollments.

(8) Recruiting efforts at all schools should incorporate special efforts to reach minorities and women.

(9) Special employment programs should be undertaken whenever possible. Some possible programs are:

(i) Technical and nontechnical co-op programs with predominately Negro and women's colleges.

(ii) "After school" and/or work-study jobs for minority youths, male and females.

(iii) Summer jobs for underprivileged youth, male and female.

(iv) Summer work-study programs for male and female faculty members of the predominantly minority schools and colleges.

(v) Motivation, training and employment programs for the hard-core unemployed, male and female.

(10) When recruiting brochures pictorially present work situations, the minority and female members of the work force should be included, especially when such brochures are used in school and career programs.

(11) Help wanted advertising should be expanded to include the minority news media and women's interest media on a regular basis.

(f) The contractor should insure that minority and female employees are given equal opportunity for promotion. Suggestions for achieving this result include:

(1) Post or otherwise announce promotional opportunities.

(2) Make an inventory of current minority and female employees to determine academic, skill and experience level of individual employees.

(3) Initiate necessary remedial, job training and work-study programs.

(4) Develop and implement formal employee evaluation programs.

(5) Make certain "worker specifications" have been validated on job performance related criteria. (Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent.)

(6) When apparently qualified minority or female employees are passed over for upgrading, require supervisory personnel to submit written justification.

(7) Establish formal career counseling programs to include attitude development, education aid, job rotation, buddy system and similar programs.

(8) Review seniority practices and seniority clauses in union contracts to insure such practices or clauses are nondiscriminatory and do not have a discriminatory effect.

(g) Make certain facilities and company-sponsored social and recreation activities are desegregated. Actively encourage all employees to participate.

(h) Encourage child care, housing and transportation programs appropriately designed to improve the employment opportunities for minorities and women.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 25654, July 12, 1974]

§ 60-2.25 Internal audit and reporting systems.

(a) The contractor should monitor records of referrals, placements, transfers, promotions and terminations at all levels to insure nondiscriminatory policy is carried out.

(b) The contractor should require formal reports from unit managers on a schedule basis as to degree to which corporate or unit goals are attained and timetables met.

(c) The contractor should review report results with all levels of management.

(d) The contractor should advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

§ 60-2.26 Support of action programs.

(a) The contractor should appoint key members of management to serve on Merit Employment Councils, Community Relations Boards and similar organizations.

(b) The contractor should encourage minority and female employees to participate actively in National Alliance of Businessmen programs for youth motivation.

(c) The contractor should support Vocational Guidance Institutes, Vestibule Training Programs and similar activities.

(d) The contractor should assist secondary schools and colleges in programs designed to enable minority and female graduates of these institutions to compete in the open employment market on a more equitable basis.

(e) The contractor should publicize achievements of minority and female employees in local and minority news media.

(f) The contractor should support programs developed by such organizations as National Alliance of Businessmen, the Urban Coalition and other organizations concerned with employment opportunities for minorities or women.

SUBPART D—MISCELLANEOUS

§ 60-2.30 Use of goals.

The purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

§ 60-2.31 Preemption.

To the extent that any State or local laws, regulations or ordinances, including those which grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, we will regard them as preempted under the Executive order.

§ 60-2.32 Supersedure.

All orders, instructions, regulations, and memoranda of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent herewith, including a previous "Order No. 4" from this Office dated January 30, 1970. Nothing in this part is intended to amend 41 CFR Part 60-3 published in the FEDERAL REGISTER on October 2, 1971 or Employee Testing and Other Selection Procedures or 41 CFR 60-20 on Sex Discrimination Guidelines.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3266

D. C. Docket No. 74-3510 "I"

BRIAN F. WEBER, Individually and on behalf of all other persons similarly situated, *Plaintiffs-Appellees,*

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and United Steelworkers of America, AFL-CIO,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

Before WISDOM, GEE and FAY, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

November 17, 1977

WISDOM, Circuit Judge, dissenting.

ISSUED AS MANDATE: June 5, 1978